

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Misty Blanchette Porter)
)
)
v.) Case No. 2:17-cv-194
)
)
Dartmouth-Hitchcock)
Medical Center, et al.)
)
_____)

RE: Day 6 of Jury Trial

DATE: March 31, 2025

LOCATION: Burlington, Vermont

BEFORE: Honorable Kevin J. Doyle
Magistrate Judge

APPEARANCES:

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		<u>Page</u>	<u>Admitted</u>
9			
10	<u>Plaintiff Exhibits</u>		
11	2	164	Y
	7	174	Y
12	9	216	Y
	11	214	Y
13	28	185	Y
	52	206	Y
14	89	157	Y
	148	192	Y
15			
16	<u>Defense Exhibits</u>		
17	B21A	116	Y
	B21B	116	Y
18	C18	70	Y
	C18A	77	Y
19	C19	141	Y

* * * * *

1 (Court opened at 8:09 a.m.)

2 COURTROOM DEPUTY: Your Honor, this is Case Number
3 17-cv-194, Misty Blanchette Porter versus Dartmouth-Hitchcock
4 Medical Center. Present on behalf of the plaintiff are
5 Attorneys Geoffrey Vitt and Eric Jones and, excuse me, Attorney
6 Sarah Nunan. Present on behalf of defendants are attorneys
7 Tristram Coffin, Morgan McDonald, and Donald Schroeder. We are
8 here on a motion in limine regarding undisclosed expert
9 opinions of Dr. Bancroft.

10 THE COURT: Good morning.

11 ATTORNEY COFFIN: Good morning, Your Honor.

12 THE COURT: Okay. So I have received the parties'
13 submissions over the weekend. Plaintiff filed twice, right, to
14 add your exhibits yesterday evening? I received that. Thank
15 you. Defendants have received a second copy with the exhibits,
16 I assume. Mr. Coffin, you've received the second filing?

17 ATTORNEY COFFIN: Oh, yes, Your Honor.

18 THE COURT: Okay, all right. So, as I say, I have
19 read both sides' filings. Happy to hear if there's any
20 additional argument. I may have some questions for you, but,
21 Mr. Coffin, your motion. Would you like to be heard?

22 ATTORNEY COFFIN: Thank you, Your Honor. I think our
23 position is pretty well laid out the papers, but just to sort
24 of briefly recap, if this was implicit in the expert analysis
25 as it's evolved over the years from Dr. Bancroft, it was not

1 spelled out with adequate clarity as required under the rules,
2 and, you know, fundamentally, we're just dealing with an issue
3 where we have to wait until what we hear coming out of
4 Dr. Bancroft's mouth as he testifies and as this evolves, and
5 we have to wait until another report comes in that changes
6 things, and that's not how it's supposed to go. It's very
7 difficult to manage that situation in trial because, you know,
8 I don't know what he's going to say until it comes out, and I
9 don't even know kind of completely what he's going to say
10 requiring me to object or waive.

11 I will say that the plaintiff's explanations of how he
12 looked at the fringe benefits and kind of the proffer of
13 testimony that I was able to see in writing, you know, albeit
14 only last night after 7:00 o'clock, or 6:30 or so, was helpful.
15 That's just not exactly how we're supposed to run the railroad
16 here, and I think some of the cases we've cited, the case, the
17 Judge Sessions opinion and the Judge Reiss opinions, kind of
18 talk about the way this is supposed to be done under the rules.
19 So and, you know, we provided some additional information to
20 the Court about the level of disclosure that we've seen in
21 addition under the, under the discovery rules for experts.

22 And so we'd submit that there, you know, we're prejudiced
23 because this is kind of a slow-rolling thing that's coming out.
24 What the Court should do about it is, practically, is a, is a
25 more difficult question, and we've made some suggestions, but

1 obviously, the opinions by Judge Reiss and Judge Sessions talk
2 about limiting or even excluding testimony. Some of the
3 lawyers in those decisions are here today, and so they've had
4 some probably more notice than I have about the import of those
5 decisions.

6 But, you know, I'd suggest that, you know, something,
7 something ought to be done to provide some limits and some
8 guidance to Dr. Bancroft's testimony, and, to me, the theme
9 that goes throughout these is that, like, they're allowed to
10 disclose and change their analysis and add to the bottom line
11 and, in the most recent case, reduce it a week before trial by
12 \$2.6 million, and we're just meant to sort of respond to that a
13 little bit on the fly.

14 You know, so I've proposed some possible resolutions to
15 the Court, and, really, you know, I look to the wisdom of the
16 Court of what the fair thing to do here is, but, to me,
17 fundamentally, you can't say that this is an obligation that
18 was a sum certain like in a sort of more normal employment case
19 because of the new opinions, the new position, the new
20 analytical models. And so I just, I think, fundamentally, the
21 thing that's really unfair is to say, Oh, well, Dartmouth
22 should have been able to foresee these changes, which, again,
23 are based largely on whatever the plaintiff happens to be
24 telling Dr. Bancroft at the moment.

25 Let's go back to the most recent report last Tuesday which

1 occurred three or four days after the evidentiary hearing where
2 Dr. Bancroft was confronted and crossed on some information.
3 The two big things that came out of that hearing -- well, there
4 are many big things that came out of that hearing, but two of
5 the bigger things that came out of the hearing is he had not
6 been informed that Dr. Porter was promoted to full professor at
7 UVM, which happened in July of 2023, and he had not been
8 provided the most recent tax return information for her fiscal
9 year 2024.

10 That was information that was uniquely in the hands of the
11 plaintiff and her counsel, and Dr. Bancroft, being a
12 prestigious economist, you think he might have followed up and
13 asked those questions because he was analyzing that she would
14 become a professor at Dartmouth based on what she was telling
15 him, and he didn't -- and that would cause a 5 percent increase
16 in her pay and would not, did not opine at all what would
17 happen with her at UVM.

18 Well, guess what? She became a professor at UVM, and he
19 did not project the 5 percent increase. And, fundamentally,
20 the, two of the key variables here, of course, are the
21 plaintiff is trying to show that she would have made more at
22 Dartmouth than she made at UVM and the bigger difference
23 between those results in larger damages calculations. So,
24 fundamentally, Your Honor, I think the Court needs to address
25 in some fashion, and we would accept the Court's wisdom on

1 this.

2 THE COURT: Okay. So the idea of preclusion in these
3 circumstances is not a general issue. It gets really in the
4 weeds about the specific allegation of the nondisclosure. So
5 what specifically are you claiming is the new opinion that was
6 not disclosed, okay?

7 So I've reviewed everything that has been attached to the
8 plaintiff's filing. You have the preliminary report issued
9 sometime in 2018. You have defense counsel deposing
10 Dr. Bancroft in 2019. There is a discussion of the methodology
11 that he applies to reach his kind of loss projections. Then
12 you have a lengthy period of time where the case, as you know
13 better than I, is dealing with summary judgment proceedings and
14 appellate proceedings and everything but eventually comes back.

15 A new report is issued in August 2024. I've looked at the
16 assumptions and the cover letter of the August 2024 report.
17 I've looked at the March 2025 report. The assumptions are
18 basically the same. The methodology is basically the same. So
19 I'm almost wondering, you know, having taken a look at the
20 hearing transcript from Friday, what the initial impetus was
21 for the objection, and I wonder if it perhaps -- maybe I'm
22 wrong, but I wonder if it was perhaps a misperception of what
23 Dr. Bancroft was saying.

24 Let me explain what I think this might mean. So it
25 appeared that, that your objection was that Dr. Bancroft might

1 be claiming that there is not going to be a continuing
2 Dartmouth-Hitchcock pension benefit going forward, which,
3 obviously, would be a different type of premise to his ultimate
4 opinion. But you'll look at the chart, the chart going back to
5 August, the chart in March, and there are continuing
6 projections for the Dartmouth-Hitchcock pension plan going
7 forward, offset by what Dr. Porter eventually makes at UVM
8 Medical Center.

9 So, you know, I've read your case law, too, right? So,
10 for example, the *Parma* case, *Town of Parma* I think, you know,
11 quite different on the facts, right? So, in that case, it's a
12 complex environmental matter. The expert apparently opines in
13 his first report on one aspect of environmental damages, and
14 then, later on down the road, has a whole new assessment of
15 environmental damages with new assumptions, new mathematical
16 calculations. I'm not so sure that I see that here.

17 And the case that you mentioned with Judge Sessions also
18 involving Dr. Bancroft, so there Judge Sessions says the theory
19 of damages is so novel, almost getting back to the 702 kind of
20 analysis, getting back towards the liability, seems like it's
21 not, again, on all fours with what we have here.

22 So, I guess, let me come around to a question. What is
23 the specific claim of inconsistency here or the new
24 information?

25 ATTORNEY COFFIN: Sure. Let me try to speak to

1 those, Your Honor. Your Honor is correct that, to a degree, in
2 part correct that the thing that sort of prompted me was my
3 concern of where he was going that he was not going to
4 acknowledge that she would get a damages or would get a pension
5 if she continued on at Dartmouth or, sorry, if she had left and
6 wasn't acknowledging that and where that was going to go in his
7 testimony.

8 That was clarified at sidebar and by additional testimony
9 and in the briefing. It doesn't -- that was not my only
10 concern. My concern is on the pensions issue as exemplary, but
11 on all of these issues we need to read between the lines for
12 what his opinion is going to be, and, you know, in the 2019
13 report there was, like, no calculation of fringe benefits, and
14 I'm concerned that the Court --

15 THE COURT: Did that report precede the deposition?

16 ATTORNEY COFFIN: Yes, it did, by less than a month.

17 THE COURT: So there was no mention in the 2019
18 report about fringe benefits involving pension, but yet there
19 was questions at the deposition about percentages and
20 assumptions on the pension plan?

21 ATTORNEY COFFIN: There was some questioning at, some
22 questioning in the deposition.

23 THE COURT: So where did the defense -- where did
24 counsel get this information about asking about the 9 percent
25 and the 12 percent assumptions in the various pension plans

1 with no report?

2 ATTORNEY COFFIN: I don't know the answer to that
3 question myself. Perhaps Mr. Schroeder can speak to that. I
4 was not involved in that deposition.

5 ATTORNEY SCHROEDER: I think the fundamental issue on
6 it, Judge, if you look at the October 1, 2019 report and
7 whether or not there's an offset, right, there's nothing in the
8 column for fringe benefits for UVM at all, and that's maybe
9 taken into account later in the August 2024 fringe benefit
10 column for UVM, but there is no offset for it in the earlier
11 reports. There's zeros.

12 THE COURT: So then why -- I'm looking at Page 40 of
13 the deposition, Document 257-1 attached to plaintiff's
14 opposition. There's an extended explanation by Dr. Bancroft as
15 to the offset. So where is this coming from if it's not in a
16 report? Why is counsel questioning Dr. Bancroft about this if
17 counsel has no basis to even understand how he was calculating
18 damages?

19 ATTORNEY COFFIN: I don't know the answer to that
20 question, but I would suggest that that's, to a degree,
21 immaterial because the expert report is supposed to provide the
22 basis for their opinions and the actual opinions that are
23 rendered, and whether or not that lawyer had some level of
24 knowledge of that, I don't know, but I'd suggest that that is
25 actually immaterial to whether or not the plaintiff still has

1 discovery obligations on expert disclosures.

2 You know, the fact is Dr. Bancroft's reports in seriatim
3 are extremely bare bones, and then the chart is very, very
4 thorough giving him a lot of leeway, if the Court were to not
5 require disclosure of the report, for deposing counsel to have
6 to sort of guess at what he's about, and questioning counsel
7 would have to guess what he's about.

8 And, you know, to see these reports evolve and change, you
9 know, both as to substance and methodology, but, you know, even
10 if it's only as to substance, you know, they change radically
11 because, Oh, I do the same thing. I provide a 12 percent
12 markup on whatever it is, but yet his information has changed
13 so the bottom line to us has changed radically and requires a
14 different analysis that we're not on notice of.

15 THE COURT: Okay. But you say the methodology has
16 changed. How has the methodology changed?

17 ATTORNEY COFFIN: The methodology --

18 THE COURT: That is critical to the case law, right?
19 If it's new methodologies, new assumptions, then that might
20 lead to a preclusion result, but if there's not new
21 methodology, that would seem to then fall on the side of the
22 ledger that says it doesn't need to be. So I really want to
23 narrow it down on, What is the changed methodology?

24 ATTORNEY COFFIN: I guess I would say, Your Honor,
25 I'm not confident it's not changed methodology because where he

1 describes where the methodology is is so de minimis and hidden
2 in the report that I'm just not confident. I haven't run the
3 numbers enough to really know that. But I would suggest that I
4 disagree with your reading of the case law because it's really
5 both things. If he radically changes the information and it
6 hasn't been disclosed to us, I do think those cases show that,
7 you know, that, too, is a failure to update information in his
8 expert report.

9 THE COURT: Definitely. So what information hasn't
10 been disclosed?

11 ATTORNEY COFFIN: So, for example, the changes in, in
12 the salary, the changes in her professor, the changes in
13 position, the allocation of the income in 2004 updated at the
14 very end. And, with regard to the pension, I don't see a
15 discounting to present value for the income stream coming on.
16 And, again, this is all stuff to have disclosed well beforehand
17 so one can understand it and think it through, but I believe
18 she can claim a pension right now at Dartmouth and could be
19 receiving that income stream, and that would be something
20 that's part of her income and would change the damages
21 calculation.

22 THE COURT: Okay. And the discounting of present
23 value, so the fact that the chart does talk about a present
24 value, that is inadequate? Third-to-last column seems to have
25 a calculation as to present value, but that, is in your view,

1 inadequate?

2 ATTORNEY COFFIN: Yeah, because depends what you mean
3 by inadequate, inadequate without further explanation and
4 guidance what it is. Because these are, you know, these are
5 numbers on the chart, and we get them, you know, a week before
6 trial. We get them after the case has been in hibernation for
7 years, and, you know, we're supposed to penetrate what these
8 numbers amount for and, you know, be prepared to, you know, get
9 whatever we can from cross-examination on the witness,
10 essentially unguided, and, you know, kind of take, take it on
11 the fly what the math is.

12 THE COURT: Okay.

13 ATTORNEY SCHROEDER: Judge, I think, just big
14 picture-wise --

15 THE COURT: Yes.

16 ATTORNEY SCHROEDER: -- when you look at the October
17 1, 2019 report, right, if there's a calculation for, well, you
18 should be getting income from Dartmouth, right, going forward,
19 they, they don't account for that as an offset for UVM.
20 There's zeros all the way down, so that's one issue. But here,
21 big picture, big picture, when you look at -- I mean, we
22 highlighted this in the outline. The numbers go from, like,
23 4.3 to 4.4 to 6.4 as of August 2024, and the number now is 1.8
24 million in economic damages? By itself, Your Honor, by -- and
25 this is eight years later, right? It, there's an incongruity

1 that falls out of the assumptions that Dr. Bancroft has made.
2 Like, on its face it is, it is a far cry from a clear
3 methodology and clear assumptions.

4 And, to the extent that the assumptions are new and the
5 numbers are lower, okay, I guess, good for Dartmouth-Hitchcock,
6 right? But we got those assumptions on March 19th of 2025, and
7 there's no way that that, that that can't be calculated within
8 the judge's decision and consideration of all the issues that
9 are before the Court. These are assumptions that were made
10 March 19th, and the only reason they were made -- and, by the
11 way, one of those assumptions is that Dr. Porter became a
12 full-time professor in May or June of 2023. Well, is that
13 reflected in Dr. Bancroft's August 2024 report? No, it wasn't,
14 and it's inexplicable why. It's a year later.

15 And so I would submit that, to the extent -- and I think
16 it's a far cry, Your Honor, to say -- I've had a lot of cases
17 with expert reports where there's actually writing in the
18 report as opposed to, Here's my list of a few assumptions and
19 some methodology and, here's the chart. This is the most bare
20 bones report I've ever seen, and I've seen it before from
21 Dr. Bancroft because I've had other cases with him dealing with
22 plaintiff's counsel.

23 So this is about as bare bones as you get. It's not a
24 quote, unquote, report because there's not really a lot of meat
25 on the bones. And so you take that and you couple that with

1 the assumptions that are made on March 19th 2025 and on the
2 heels of trial, brand-new assumptions, I mean, they obviously
3 lower the economic value of the case.

4 THE COURT: And, with respect to those assumptions,
5 I'm looking at the cover letter March 19th. Assumption 1, no
6 DHMC salary increases for 2020 and 2021. So that assumption
7 was put into this report based on Mr. Coffin's
8 cross-examination at the motion in limine, correct?

9 ATTORNEY SCHROEDER: Correct, on March 14th.

10 THE COURT: So, Number 2, an additional UVM fridge
11 benefit of \$7,698 for the son's UVM tuition, that was also in
12 response to Mr. Coffin's cross-examination at the motion in
13 limine, correct?

14 ATTORNEY SCHROEDER: Correct.

15 THE COURT: Okay. The no loss of DHMC's medical
16 insurance contributions beyond April 2018, does that derive
17 from the evidentiary hearing?

18 ATTORNEY SCHROEDER: I don't recall. With such an
19 exquisite cross-examination from Mr. Coffin, I may have been
20 lost in that. I'm not entirely sure, Your Honor.

21 THE COURT: Okay. Then I just want to understand
22 what the genesis is of the various changes in the report.

23 ATTORNEY SCHROEDER: Yeah.

24 THE COURT: So Dr. Porter's actual -- I'm sorry.
25 UVM's retirement contribution is equal to 9 percent of her

1 income. So that is relatively similar to the assumption listed
2 in the August report, if not the same, right? One was 8.5
3 percent. The other was 9.

4 ATTORNEY SCHROEDER: Yes, I think you're right.

5 THE COURT: Okay. So this change is not particularly
6 --

7 ATTORNEY SCHROEDER: Meaningful.

8 THE COURT: Right, okay. Dr. Porter's actual 2024
9 UVM earned income, now, this was a topic explored at the motion
10 in limine hearing about, and I believe Dr. Bancroft essentially
11 was saying, Well, I don't have the W-2 yet. He was
12 cross-examined on that. Clearly, he, not clearly, but he must
13 have received a W-2 after that hearing and made this adjustment
14 to the report. Do you have that information, the W-2?

15 ATTORNEY SCHROEDER: We got it. We got it after we
16 wrote to them that week right before trial. And just on that
17 point, Your Honor --

18 THE COURT: I just want to finish this list. All
19 right. So with that, though, what that amounts to is what
20 perhaps was initially a projection of lost income in 2024 Has
21 now been substantiated for the actual amount earned in that
22 year based on the W-2, right?

23 ATTORNEY SCHROEDER: I would assume so, Your Honor.
24 The problem I have is that it should have been disclosed in
25 January of 2025 when everybody, I believe, that is a W-2

1 employee gets their W-2 delivered to their house or through
2 their employer. It wasn't disclosed. It wasn't disclosed.

3 THE COURT: Okay. And then 6, the assumption that
4 Dr. Porter will go to a 75 percent part-time position, as I
5 recall, there may have been some questions. I'm not sure if it
6 got to this point, though, at the motion in limine hearing.

7 ATTORNEY SCHROEDER: This is -- I don't know whether
8 it came up then or in his cross-examination on Friday, Your
9 Honor, but there is no question that that assumption standing
10 alone is brand new. And, and there's been some testimony as
11 to, Well, I couldn't do this, I couldn't do that. All those
12 things, whether that's true or not, are things that have
13 apparently or allegedly happened within the last six months.

14 I don't know when that happened. But you can't say that a
15 deposition in October of 2019, you know, would suffice to be
16 able to say, Well, I've got to be a fortune teller and figure
17 out what it would look like. That assumption is brand-new.

18 THE COURT: Right. Of course, that kind of an
19 assumption, I guess, could change over time based on the
20 plaintiff's kind of plans for her life, couldn't it? So, if
21 you have -- I mean we're in a little bit of a tough spot here,
22 right? Because I hear your point about how, at a deposition in
23 2019, how are you to kind of know what the report might be?
24 You wouldn't have known that the final report is going to come
25 out some six years later.

1 ATTORNEY SCHROEDER: Understood.

2 THE COURT: And, I guess, you know, on the one hand
3 -- obviously, you can see what I'm getting at here -- some of
4 these revised assumptions were because of issues raised at the
5 evidentiary hearing. So what am I to do to not permit those
6 types of changes to be made in response to questioning,
7 legitimate questioning of the witness if I didn't -- or not
8 that I have anything to do with whether a revised report was
9 issued, but, once it was issued if somehow I were to say that
10 that's inappropriate, then wouldn't there kind of be a separate
11 issue then there too? Mr. Coffin?

12 ATTORNEY COFFIN: Not to come up in here, Your Honor,
13 but with the Court's permission, I'd just like to add. The
14 Court views our eliciting of this information at
15 cross-examination as somehow something that should redound to
16 the benefit of the plaintiffs here. On the contrary, this is
17 stuff, every single one of those they should have disclosed
18 earlier on, in my view.

19 ATTORNEY SCHROEDER: And just, Your Honor, one last
20 point just to jump on -- no, you used word redound very well.
21 Thank you. The issue we have is one assumption was made, one
22 assumption that he makes is based on a fact from May, June of
23 2023. There is no question about that, that Dr. Porter assumed
24 a full-time, received a promotion to a full-time professor at
25 UVM. We may have learned that fact by way of great

1 cross-examination by my brother, Mr. Coffin. However, that
2 fact should have been disclosed certainly before the August
3 2024 report, right?

4 In terms of this going to a .75, I don't believe there is
5 any testimony that that just happened magically in the last two
6 months, that she could only go, that Dr. Porter could only go
7 to .75 and not .6. That is not what the testimony was, I
8 believe, in the record. So that's another assumption that -- I
9 understand, things change over time, but they need to be timely
10 disclosed, Your Honor, and that was not timely disclosed.

11 And, in terms of the W-2, the only reason we knew that
12 there was -- well, we had asked for the W-2, and it should have
13 been disclosed when the W-2 was issued, and unless they do
14 things differently in Vermont, I'm pretty sure that most W-2s
15 get issued in January, and they should have been disclosed well
16 in advance of March 19th or, actually, after March, around
17 March 19th when we asked for the documents. Where are the
18 documents? We shouldn't have to ask for those documents.
19 Those should be disclosed on a timely fashion. They weren't.
20 They came out of that March 14th hearing.

21 And, to Mr. Coffin's point, well, because we were able to
22 examine Dr. Bancroft and elicit that testimony, that shouldn't
23 inure to the plaintiff's benefit because they were late in
24 disclosing these things. Leave it up to the Court's discretion
25 on how that's dealt with with Dr. Bancroft, but that's the

1 conundrum we're in.

2 THE COURT: And, in practical effect, so before you
3 actually get a W-2 for that year -- this is kind of the point I
4 was making before or trying to make before. Until you get the
5 actual income as established by that W-2, before that you're
6 working off of an income projection, right?

7 ATTORNEY SCHROEDER: Yes, but here's the other issue,
8 though. In 2023, right, there would be a W-2 for 2023 which
9 would, which would show a jump in salary assumption. Now, you
10 wouldn't necessarily see that. You'd have to, you know, the
11 baked-in figures. And, by the way, there was no report until
12 August of 2024, and I don't believe -- so there's a disclosure
13 issue on the, on that issue because you're talking about two
14 years of data, the W-2 for 2023 and the W-2 for 2024.

15 You are making projections, but the problem is the
16 projections, I don't believe, are being, are taken into account
17 and certainly not disclosed in any way in the August 2024
18 report, and that would have related to a year earlier when she
19 was appointed to full professor.

20 THE COURT: Right. But, as to the more recent
21 information, my point is simply, what was projected income
22 becomes actual income now based on that W-2 --

23 ATTORNEY SCHROEDER: Yes, Your Honor.

24 THE COURT: -- in terms of prejudice to the defendant
25 on that point?

1 ATTORNEY SCHROEDER: Correct, Your Honor, yes.

2 THE COURT: Okay.

3 ATTORNEY JONES: May I?

4 THE COURT: Yes, Mr. Jones.

5 ATTORNEY JONES: I'm not sure where to begin, but let
6 me start with this. The kerfuffle on Friday was triggered by
7 questions about the pension. Everything else that they
8 mentioned this morning was part of their renewed motion to
9 preclude Dr. Bancroft's testimony that they filed before trial.
10 You've already ruled on that, so I don't know why we are
11 relitigating all that stuff, okay? That was already dealt
12 with, first of all.

13 Second of all, you're absolutely correct, Your Honor.
14 Nothing has changed about the fundamental assumptions. Nothing
15 has changed about the methodology. There has been no change.

16 Third, the October 2019 report did, in fact, have
17 information about the pension, which is why Attorney Joseph
18 inquired of it. The columns that my colleague seems so
19 obsessed about under UVM having zero was because, at that time,
20 my client was a per diem, not eligible for that benefit. But,
21 in the August report and the most recent report, we have that
22 data. No one is hiding anything. The only surprise, frankly,
23 is that this happened last Friday.

24 THE COURT: Okay. Did you want to speak to the point
25 about the full-time professorship and the part-time?

1 ATTORNEY JONES: Well, that was part of the pretrial
2 renewed motion that was an account then. At the hearing on
3 October, on March 14th, Dr. Bancroft actually even addressed
4 that, at that time, he was using current pay stubs so that he
5 already had the salary reflecting her promotion so he no longer
6 had to add a 5 percent increase. I think I even asked him the
7 question, Because he was using actual pay stubs, it would be
8 inappropriate to then add 5 more percent, and he said "yes".

9 So that was part of the pretrial rulings on this issue
10 that have been heard and resolved already. The only thing that
11 blew up on Friday was this pension issue, and that wasn't new.

12 ATTORNEY COFFIN: I'd just say we have received no
13 pay stubs from 2025 or 2024, any reliance materials since prior
14 to the deposition, not for the 20, August 2024 report and
15 certainly not related to the basis for Dr. Bancroft's
16 testimony. So, if he was basing them on those, we haven't been
17 provided that reliance material.

18 THE COURT: Mr. Jones?

19 ATTORNEY JONES: On what material?

20 ATTORNEY COFFIN: You said that -- I think you just
21 said in court that Dr. Bancroft based his opinion about the
22 full professorship and her salary going forward on recent pay
23 stubs. I have seen no pay stubs like that.

24 ATTORNEY JONES: After that hearing you asked us for
25 the W-2s, which we promptly provided, and those are the full

1 year's actual salary.

2 ATTORNEY COFFIN: I guess, my misunderstanding. I
3 thought pay stubs are different than W-2s. W-2 is a report of
4 your yearly earnings for the IRS, is my understanding, and pay
5 stubs are the stubs you get with your pay. I, I, we haven't
6 received pay stubs.

7 And, of course, I believe -- you know, we'd have to check
8 the transcript, but I believe, in response to questioning by
9 Mr. Vitt, Dr. Bancroft described reviewing pay stubs, W-2s, tax
10 return information. That would surprise me because we have
11 received none of that in recent times and none, no pay stubs,
12 essentially, no pay stubs from earlier times.

13 ATTORNEY JONES: After the hearing Mr. Coffin asked
14 us for some documents. We gave him every document.

15 THE COURT: When you say after the hearing --

16 ATTORNEY JONES: After the March 4th motion in limine
17 hearing.

18 THE COURT: Okay. What did you provide, Mr. Jones?

19 ATTORNEY JONES: I'm sorry. After the March 14th
20 motion in limine hearing, Mr. Coffin sent us a list of
21 documents he wanted. We gave it to him, and they're all
22 actually now on defendant's exhibit list. So, I mean, not only
23 do they have it, it's on their exhibit list.

24 THE COURT: Consisting of, what, though? Are these
25 W-2s?

1 ATTORNEY JONES: It's the W-2s. It's the letter
2 memorializing Dr. Porter's promotion to her full professorship.
3 I forget what else.

4 ATTORNEY COFFIN: There is nothing else. Well, the
5 the letter request was more fulsome than that, but one thing --

6 THE COURT: Mr. Jones. Go ahead, Mr. Coffin.

7 ATTORNEY COFFIN: The letter requested certain
8 things. There was a follow-up letter sent on Monday or
9 Tuesday. I did mention to them after the hearing on Friday
10 that we wanted the most recent pay information, including the
11 W-2s. We were told that would be coming. We did not
12 immediately receive it over the weekend, so we sent a letter.
13 I think the next day we got the contract between UVM and
14 Dr. Porter for her full professorship, and we got the most
15 recent 2024 W-2s.

16 I believe that was all. Checking and verifying. That's
17 all we got. Our request for pay information was broader than
18 that. But, in any event, it specifically requested the W-2s,
19 and we only got the W-2s and the pay contract.

20 THE COURT: And that's for 2024 and 2023?

21 ATTORNEY COFFIN: Yes. From the time of her full
22 professorship, which was she was appointed, I believe, in May
23 2023, effective July 1, 2023.

24 THE COURT: Okay. Are you suggesting that the W-2s
25 are, or the pay stubs are required in addition to the W-2s and

1 that you're somehow prejudiced without getting pay stubs as
2 opposed to W-2s?

3 ATTORNEY COFFIN: I would suggest that a qualified
4 economist may need to look at those and that Dr. Bancroft
5 testified that he did, and plaintiff's counsel said that, on
6 direct examination, a question implying that he was provided
7 them to him and followed up by Mr. Jones making the same
8 implication here. All I'm saying is we would have requested
9 those as materials that Dr. Bancroft relied on and had not been
10 provided to them. They had not been provided to us.

11 THE COURT: Okay. Anything further? Mr. Jones?

12 ATTORNEY JONES: No, Your Honor.

13 THE COURT: Okay. I'm just going to take a very
14 brief five minutes. I want to collect something, and I'll be
15 right back.

16 (A recess was taken from 8:43 a.m. to 9:01 a.m.)

17 THE COURT: Okay. So, just beginning with a couple
18 of the factual issues that were discussed this morning, with
19 respect to the pay stubs issue, so I do not think pay stubs
20 were brought up at the motion in limine hearing from a review
21 of the transcript. Just kind of putting that out there.

22 With respect to pay stubs mentioned on Friday as part of
23 direct, so the transcript that I received, of course, of
24 Friday's hearing is incomplete. It's just an excised portion
25 of that transcript. But, based on that transcript, limited

1 though it is, there is no reference to pay stubs there. I
2 don't have a recollection myself about the mention of pay
3 stubs. Look, if it turns out that the full transcript says
4 otherwise, it is what it is. But, at least in terms of what I
5 can recall sitting here today, I don't recall mention of that.

6 With respect to the discussion about the 2019 Dr. Bancroft
7 report, particularly the section that has zeros in it with
8 respect to UVM pension plans, after 2021 I believe that report
9 then has a series of zeros. The assumption in that 2019
10 report, though, I believe, was that Dr. Porter would leave UVM
11 in July of 2021, which would appear to account for the fact
12 that that earlier report has zeros from the summer of 2021 and
13 beyond.

14 The August 2024 report, however, does again, as you know,
15 picks up the UVM benefits from 2021 on, to reflect what, in
16 fact, happened, which was that Dr. Porter did not leave UVM.
17 So that is an explanation for that particular observation made
18 earlier. So it does seem to me then that defendants did have
19 pension information relevant to both Dartmouth-Hitchcock and
20 UVM prior to that deposition in 2019.

21 With respect to the full professorship, I believe the
22 suggestion was that Dr. Bancroft didn't know about the full
23 professorship and didn't include it in his August 2024 report
24 but that it was included in the March 2025 report in response
25 to questioning. But, as I recall from the motion in limine

1 hearing, Dr. Bancroft had said he used the 2023 W-2 and
2 information from UVM as to what salary Dr. Porter would earn as
3 a result of the full professorship. There was discussion of
4 the letter that the University of Vermont sent detailing that,
5 and, as I understand it, that is in the possession of counsel.
6 And then the updated report in March of 2024 incorporates that
7 W-2, but that does not mean that Dr. Bancroft did not have
8 knowledge of that full professorship at the time that he
9 rendered his report.

10 So, with respect to the decision now, I'm just going to
11 create a record here as to what brings us here. So Plaintiff's
12 counsel, on Friday, began his direct examination of
13 Dr. Bancroft on Friday, March 28th. When counsel began to ask
14 Dr. Bancroft questions about his assessment of damages as it
15 related to a retirement plan Dr. Porter participated in while
16 employed at Dartmouth Health, defendants objected.

17 The apparent basis for the objection at that time was
18 defendants' assertion that Dr. Bancroft's retirement plan
19 analysis was not included in the expert report, and that report
20 included his stated assumptions on the line report and the
21 chart representing the results of his analysis and that the
22 chart did not take into account the present value of the
23 benefit plaintiff would obtain by receipt of lifelong payments
24 from her Dartmouth Health pension plan.

25 The Court excused the jury and heard from the parties on

1 their respective positions. Dr. Bancroft was also examined on
2 the issue, and the Court ultimately reserved judgment on the
3 issue and directed the parties to file written submissions over
4 the weekend, which the parties did.

5 In the case cited by defendants, *McLaughlin v. Langrock*,
6 *Sperry & Wool*, 2020 Westlaw 3118646, this court cited authority
7 for the proposition that, quote, "Although experts must
8 supplement their reports if incorrect or incomplete, they're
9 not free to continually bolster, strengthen, or improve their
10 reports by endlessly researching the issues they already opined
11 upon or to continually supplement their opinions.
12 Supplementation under Rule 26(e) is thus generally only
13 appropriate when the expert learns of information that was not
14 previously made known or available to him or her."

15 In this case, it appears that Dr. Bancroft's initial
16 expert report issued more than five years ago. Plaintiff's
17 exhibit list for this trial includes a revised analysis dated
18 August 26th 2024, and the cover letter of the report suggests
19 that, in part, the reason for the revised analysis was to
20 account for new data acquired since the last report was issued
21 years earlier. As I mentioned earlier, there were obviously
22 summary judgment proceedings in this court and then appealed to
23 the Second Circuit, which accounts for a period of years
24 between the report issued in 2019 and the revised analysis in
25 August of 2024.

1 In a second case cited by defendants, *Chart v. Town of*
2 *Parma*, 2014 Westlaw 4923166 at Star 20, the court stated, "An
3 expert should be precluded from testifying about previously
4 undisclosed opinions, particularly where they expound a wholly
5 new and complex approach. In contrast, expert testimony can
6 provide additional information or elaborate on previously
7 expressed opinions so long as the testimony is within the scope
8 of the expert's report."

9 *Chart v. Town of Parma* provides an illustration of the
10 type of subsequent opinion that warrants preclusion of the
11 expert's subsequent report. There, in the context of a case
12 involving contaminated soil in a town park and complex
13 mathematical calculations of potential risk to human health,
14 the court precluded certain portions of the subsequent opinion
15 stating as follows:

16 "The human health risk assessment contained in the second
17 report is an untimely new opinion because it is supported by
18 different calculations and assumptions."

19 In this case, the evidence does not amount to a previously
20 undisclosed opinion that expounds a wholly new and complex
21 approach. Rather, the testimony objected to on Friday is an
22 elaboration on a previously expressed opinion, and the
23 testimony was within the scope of the expert's report.
24 Dr. Bancroft was deposed on October, in October of 2019. At
25 the deposition defendant's counsel, Jessica Joseph, asked

1 Dr. Bancroft what documents he had reviewed to reach his
2 damages opinion.

3 He responded that he had reviewed a benefits statement
4 from Dartmouth-Hitchcock dealing with pensions and a letter
5 from Dartmouth-Hitchcock to Dr. Porter regarding her pension
6 benefits at the time of her termination. And that's at
7 Document 257-1 at 3, using the ECF page numbers.

8 Also, at deposition Dr. Bancroft explained to counsel the
9 analytical process he followed, explicitly stating that it
10 included accounting for gross earnings at Dartmouth-Hitchcock,
11 which was salary plus fringe benefits, and offsetting that
12 amount by the value of total benefits received
13 post-termination, again, including salary and fringe benefits.
14 Dr. Bancroft confirmed that he has used this approach for
15 estimating loss for some 20 or 25 years and that the approach
16 was generally accepted by economists.

17 Defendant's counsel also inquired about the basis for
18 assuming that Dartmouth-Hitchcock would contribute 12 percent
19 to retirement. Counsel also inquired about the basis for the
20 assumption in the report that UVM's contribution to
21 Dr. Porter's retirement plan would be 9 percent. That is at
22 Document 257-1 at 19.

23 The August 2024 report assumes Dartmouth-Hitchcock Medical
24 Center's retirement plan contributions to be 12 percent of
25 earned income. It also assumes UVM's contribution to a

1 retirement plan to equal 8.5 percent of income. The report
2 also assumes, quote, "the difference between DHMC and
3 post-termination projections of total earnings". That is
4 Assumption 7.

5 The March 19th 2025 updated analysis similarly assumes a
6 12 percent Dartmouth-Hitchcock Medical Center contribution and
7 a slightly higher UVM contribution at 9 percent. The report
8 again assumes, quote, "the difference between DHMC and UVMMC
9 post-termination projections of total earnings".

10 In terms of changes to the most recent report, as
11 discussed with counsel this morning, these appear to be either
12 in response to issues counsel explored with Dr. Bancroft at the
13 motion in limine evidentiary hearing on March 14th, for
14 example, no salary increases from 2020 to 2021, tuition
15 remission at UVM in 2019, and actual earned income in 2024.
16 More additional information reflecting Dr. Porter's actual 2024
17 income and adjusted assumed settlement date to account for the
18 timing of this trial and the current interest rate.

19 Importantly, Dr. Bancroft confirmed that his methodology
20 had not changed across all his reports, and that is at 257-2 at
21 5, that the exercise is to determine total earnings at DHMC and
22 offset it by total earnings post-termination. And Dr. Bancroft
23 was also questioned about fringe benefits at DHMC and UVM. The
24 August 2024 report and March 2025 reports reflect this
25 particular aspect of the analysis, which appears to have been

1 consistent over time.

2 So, having addressed some of the factual issues at the
3 outset and explaining why I think this does not fit within the
4 scope of the cited case law, I am not going to preclude
5 Dr. Bancroft from testifying further this morning or otherwise
6 impose any other sanction related to his testimony. So I'm
7 going to ask that the jury be brought in.

8 ATTORNEY VITT: I have a scheduling issue, Your
9 Honor, and I hesitate, and I do mean hesitate, to raise this
10 issue, but I think it's best that I get it out on the table
11 now. Dr. Bancroft is here. We are prepared to put him on and
12 proceed with his direct and, what I expect and have been told,
13 maybe a lengthy cross-examination. In addition, Dr. Leslie
14 DeMars is here, at least I think so. I saw somebody out in the
15 lobby that I think was Leslie DeMars.

16 And the reason I'm up here now is I've been told that she
17 has a need to absolutely finish her testimony today, got to be
18 done. She has to leave. She has an appointment or something.
19 I don't know what it is. But, anyway, the representation is
20 she has to finish her testimony today, and, in light of that
21 and the amount of time that I think it's going to take with
22 Leslie DeMars -- this is not going to be a short exam. There
23 are multiple exhibits. Her testimony, you know, her name comes
24 up repeatedly.

25 And we'd suggest that, all right, Dr. Bancroft lives

1 locally. He's made a number of trips here, and, if necessary,
2 we can do him, you know, after Leslie DeMars, but I gather that
3 that's not possible, and I just don't want to be in a situation
4 where it gets to the end of the day, we're not finished, and
5 our position is, until she's excused, she needs to be back
6 here. So I'm raising this issue now. Again, I hesitated to do
7 it, but I thought, Let's get this issue on the table before we
8 start the testimony.

9 THE COURT: Okay. Mr. Schroeder?

10 ATTORNEY SCHROEDER: Your Honor, it's our position
11 that Dr. Bancroft's on the stand, right? He's under
12 examination right now, and we believe that we should proceed
13 with that. They sent the subpoena for Leslie DeMars -- they
14 didn't even tell us about it, even though it's my client -- on
15 December 19th, right? Purposeful, obviously, even though her
16 testimony wasn't going to be until today. It doesn't say
17 "March 31 and continuing thereafter", which I have had
18 subpoenas say.

19 She's here today. She has another job, an important job.
20 She had to take a vacation day to be here. She also has travel
21 at the end of the week going into next week into Massachusetts
22 to where the company is located. She shouldn't have to take
23 two vacation days to be here because of a timing issue by
24 plaintiff's counsel in how they put witnesses on. They had a
25 list of 25. They went down miraculously to a much smaller

1 list.

2 They've always had her. They decided they wanted to call
3 her in their case in chief, which they have the right to do,
4 but they've got to do it today. That's our submission. We'll
5 obviously defer to the Court's discretion and ruling, and but,
6 you know, on the one hand, they want to have their cake and eat
7 it too. I mean, not really on the one hand. On both hands,
8 right, they want to have their cake and eat it too because they
9 want to call her in their case in chief.

10 We have said from day one, Your Honor, that we would call
11 her in our case in chief if they wanted to wait because then
12 they could cross-examine her as long as they wanted, but they
13 can't have it both ways, Your Honor, and they've been
14 manipulating the schedule up through now, and we are doing our
15 level best to -- and we actually told them last week a number
16 of witnesses that we had taken off of our list so that they
17 could go act accordingly and not have to worry about prepping
18 for those witnesses because we were trying to streamline our
19 case. We told them that last week.

20 THE COURT: All right, okay. Well, Friday we
21 obviously ended early and unexpectedly, right? Dr. Bancroft
22 was supposed to be finished on Friday. This issue was raised.
23 I think the jury left around 2:00 o'clock, before 2:00 o'clock.

24 ATTORNEY SCHROEDER: 3:00 o'clock, Your Honor.

25 THE COURT: 3:00 o'clock, it was that late? Okay.

1 And, as a result of that, that obviously set us back a bit on
2 the timing of getting Dr. Bancroft done.

3 So I certainly hear what you're saying, but we're also
4 kind of in a little bit of a situation here where there's very
5 little choice, given that we didn't get through everything that
6 we were going to get through on Friday. So let's start with
7 Dr. Bancroft, see what kind of progress we can make, and
8 hopefully get Dr. DeMars on the stand as quickly as possible.

9 ATTORNEY SCHROEDER: She's here, Your Honor.

10 THE COURT: She is here now?

11 ATTORNEY SCHROEDER: She is.

12 THE COURT: Okay. So is there any -- I don't know if
13 you spoke to this already, Mr. Vitt. Is there any suggestion
14 that -- we already have Dr. Bancroft on the stand, so I guess
15 we can't adjust that. So, all right, go ahead with
16 Dr. Bancroft.

17 ATTORNEY VITT: Excuse me, Your Honor, a second.

18 THE COURT: So I just want to let the parties know
19 the deputy clerk has advised me that one of our jurors has a
20 family member in the hospital, and the juror, at this time, is
21 fine to be here, but I just wanted to put that on the people's
22 radar screens in case those circumstances change. Just wanted
23 to mention that to you. We're going to go forward at this
24 time.

25 ATTORNEY VITT: All right. And is Your Honor leaving

1 for another moment the issue of whether Dr., if we do not
2 finish Dr. DeMars, whether she comes back tomorrow? That issue
3 is kind of on the table but not being resolved now?

4 THE COURT: Perhaps it's one that won't need to be
5 resolved depending on how things go.

6 ATTORNEY VITT: There's always hope.

7 THE COURT: I think we'll put Dr. Bancroft on the
8 stand and then bring the jury in.

9 (The Jury enters the courtroom.)

10 COURTROOM DEPUTY: Your Honor, the matter before the
11 Court is Case Number 17-cv-194, Misty Blanchette Porter versus
12 Dartmouth-Hitchcock Medical Center. Present on behalf of the
13 plaintiffs or plaintiff is Attorneys Geoffrey Vitt, Eric Jones,
14 and Sarah Nunan. Present on behalf of the defendants are
15 Attorneys Tristram Coffin, Morgan McDonald, and Donald
16 Schroeder. We are here for day six of a jury trial.

17 THE COURT: Okay. Good morning, everyone. Over the
18 weekend, have you spoken to anyone about the case or otherwise
19 heard about this case since Friday? Okay. Seeing no hands
20 raised.

21 Dr. Bancroft is back on the stand. As I mentioned to you
22 on Friday, sometimes it's necessary for the Court to speak with
23 the lawyers. That has happened, and we are ready to proceed.
24 So thank you for your patience. Mr. Vitt. We can swear in
25 Dr. Bancroft again.

1 Robert L. Bancroft,
2 having been duly sworn to tell the truth,
3 testifies as follows:

4 DIRECT EXAMINATION BY ATTORNEY VITT

5 Q. Good morning, Dr. Bancroft.

6 A. Good morning.

7 ATTORNEY VITT: Your Honor, when Dr. Bancroft was on
8 the stand before, I think we had Plaintiff's Exhibit 1B on the
9 screen. If that could come back up, I'd appreciate it.

10 THE COURT: Okay.

11 ATTORNEY VITT: Actually, I've got a paper copy.

12 ATTORNEY JONES: I'm sorry. We're going to have to
13 use the projector.

14 BY ATTORNEY VITT:

15 Q. Just to recap where we were when we had the little break,
16 the analysis that you did reflects lost earnings for what
17 years?

18 A. From 2017, actually, from June 3rd of 2017 through 2033.

19 Q. 2033?

20 A. Yes.

21 Q. And, at that point, Dr. Porter would be 70 years old?

22 A. Yes, that's correct.

23 Q. All right. And you're not projecting or predicting that
24 she would work up until she's 70, right?

25 A. No, I'm not. I'm leaving that to the jury to decide

1 what's a reasonable expectation on how long she's going to
2 work.

3 Q. And could you briefly recap how you proceeded with your
4 analysis and reached your conclusions?

5 A. Sure. Just a quick overview, what I'm doing is projecting
6 out what her earnings, what I believe her earnings would be if
7 she continued to work at Dartmouth. That's being offset by her
8 actual earnings to date or through 2024, and then I'm
9 projecting what her earnings could be in the future, and that's
10 based on her continuing employment at UVM. And then I make
11 some other calculations, back out taxes, determine present
12 value, and have to look at settlement taxes that would be
13 assessed on a settlement.

14 Q. Okay. What assumption -- I'm going to back up. Excuse
15 me. Did you make assumptions about the raises that Dr. Porter
16 would receive at UVM?

17 A. Yes. In developing my projections of her earnings, which
18 is -- and I'm going to refer to the footnotes as the column
19 numbers, but in Column 1 under the Dartmouth-Hitchcock Medical
20 Center gross earned income, there are assumptions about how her
21 income would have grown over time. It's predicated for the
22 most part with prior to 2017 is predicated on what her salary
23 was in 2017.

24 Q. Right.

25 A. Most of the years have a 2.5 percent salary inflator.

1 There are two exceptions, well, three exceptions to that, if
2 you will.

3 Q. Okay.

4 A. One is in 2019. Instead of 2.5, I assumed that the
5 increase would be 5 percent based on Dr. Porter's
6 representation that she would have been promoted to a full
7 professor.

8 Q. And, in fact, she was promoted to full professor, correct?
9 I'm sorry. This was for 2019?

10 A. This is 2019.

11 Q. I'm sorry. At Dartmouth, okay.

12 A. Yes. And then the other two exceptions are in the year
13 2000 and 2021. Based on representation from defense counsel
14 that there were no wage increases during those two years, I
15 eliminated the 2.5 percent figure. And then that, starting in
16 2022, I used the 2.5 percent wage salary inflator.

17 Q. Did you make an assumption about whether there would be a
18 raise to try and make up for the Covid years?

19 A. No, I didn't. I, again, I went back and used the 2.5.

20 Q. Okay. So, using the report, can you explain your analysis
21 by year and what you're attempting to do?

22 A. Sure. So, as I just discussed, the first three columns
23 are under the Dartmouth-Hitchcock Medical Center, and what I'm
24 estimating there is what I believe the value which she would
25 have earned and the value of fringe benefits if she continued

1 to work at Dartmouth.

2 The first column, the gross earned income, I think I
3 pretty much went over, but it's, for all intents and purposes,
4 it's based on her salary in 2017 at the time she was terminated
5 and a 2.5 percent inflator for most years with, with three
6 exceptions. the 5 percent in 2019, when I, based on her
7 representations, she would have been promoted to a full
8 professor, and then no increases for 2000 and 2021.

9 2017 was a little different because she was, obviously,
10 she worked part of the year, but she was on disability, and the
11 expectation is that she wasn't going to go back full time until
12 the fall. And so that's, those numbers are relatively small,
13 and, actually, there's minimal loss in the year 2017.

14 Q. And the disability income that she received, is that
15 reflected in your chart?

16 A. Yes.

17 Q. You also project fringe benefits do you not, Column 2?

18 A. Yes.

19 Q. How did you do that?

20 A. So the Column 2, for all intents, for most every single --
21 in every single year I have assumed, estimated the value of
22 Dartmouth's contribution to her retirement plan for the years
23 2018 going forward, very simple. In 2018 they made everybody
24 go onto a defined contribution plan, and Dr. Porter, if she was
25 there, would have received a, 12 percent of her salary would

1 have been put into a 403(b).

2 In 2017, if she continued to work for that additional
3 seven months, she would have been under their prior defined
4 benefit program. And so in that year I had to estimate what,
5 how much her, her pension would go up if she had worked that
6 additional seven months, and it turned out it was around -- I
7 think it was about \$3,000 or \$4,000 a year. And then I had to
8 do some calculations, how much money would Dartmouth need to
9 have put into the defined benefit program that would fund that
10 additional three, the additional \$3,000 when she retired, and
11 that turned out to be about 12.4 percent. But I just, I used
12 12 percent to be, to be consistent with the other years.

13 Q. You mentioned two types of plans, a defined benefit versus
14 defined contribution. Can you describe briefly what the
15 differences are?

16 A. Sure. The defined benefit program, there's not many of
17 those around. State employees of the State of Vermont have a
18 defined benefit. Teachers have a defined benefit. And that's,
19 there's a formula for it. In Dartmouth's case, you have to
20 take the average of your high five years of earnings, and then
21 there is a formula that you break the earnings down between
22 some covered and some -- I forget what the term they use for
23 it.

24 Basically, the first 10 percent, roughly 10 percent is,
25 there's a factor of 1.75 percent. It's multiplied by that

1 number, and then for the 90 percent the factor is 2.3 percent,
2 and both, both calculations also have the number of years that
3 the employee has served. In Dr. Porter's case, she had served
4 20.69 years. So you go through that calculation. There's
5 basically two calculations, one for the 1.75 percent and the
6 other one for the the 2.3 percent.

7 Q. Will Dr. Porter still receive a retirement payment, will
8 be eligible to receive a retirement payment from
9 Dartmouth-Hitchcock when she turns 65?

10 A. Yes, she would be. She, that's locked in. The defined
11 benefit plan locks that number in. And so whether, even if she
12 had continued working on, she would have received what she,
13 what she was entitled to up through June 3rd of 2017, and then
14 she would have got a little bit more if she continued to work a
15 little bit more under that defined benefit plan until the end
16 of 2017. And then in 2018 Dartmouth moved all, everybody into
17 a defined contribution plan, and she would get 12 percent.

18 Q. If she had remained an employee at Dartmouth-Hitchcock,
19 would the retirement payments that she would be entitled to
20 receive be higher?

21 A. Oh, absolutely.

22 Q. And you've taken that into account when you're analyzing
23 the fringe benefit component on your chart, right?

24 A. Yes. I'm measuring the additional benefit that she has.
25 She has, still has a benefit that she's going to receive when

1 she retires or decides to draw on that retirement. I'm only
2 interested in how that would have increased, what was the value
3 of the increases over time. So I'm looking at the marginal or
4 the additional value of that benefit.

5 I should also point out that in the fringe benefits in the
6 year 2017 and 2018, I do have Dartmouth's, some measure of
7 Dartmouth's contribution to a health insurance. For the first
8 seven, for the last seven months of 2017, She had no health
9 insurance, and then for the first four months of 2018, she had
10 no health insurance. So I put in the value of Dartmouth's
11 health insurance. Going forward, I eliminated it because she
12 was getting coverage at UVM and so it was a wash.

13 Q. Is it your understanding that, while she was a per diem
14 employee before she was a full-time employee, UVM did not
15 provide her with health insurance?

16 A. That's correct.

17 Q. And that, after she became a full-time employee, did you
18 understand that health insurance was part of the package?

19 A. That's right, yes.

20 Q. So, going back to your chart --

21 A. Okay. So the third column there, it's a mathematical
22 calculation. It's adding the numbers from Column 1 and Column
23 2. So that's my estimate of what the total value of her
24 earnings would be if she continued to work at Dartmouth.

25 Q. You've done that for each year?

1 A. Added it up for each year, yes, correct. And then the
2 next three columns over are my, are the post-termination. I
3 title them post-termination projections UVM although for '17
4 through 2024 I'm using her actual earnings. So my notes start
5 projecting until the year 2025, and the projections on 2025 are
6 based on what she earned in 2024 and Dr. Porter's
7 representation that she would go to a 75 percent part-time
8 position where she's currently at an 8 percent.

9 So in 2025 I've got, I have a 3 percent wage inflator that
10 I'm assuming in the UVM projections.

11 Q. Do you believe that's reasonable?

12 A. Yes, and I, the reason that I had 3 percent, half a
13 percent higher than I had in the Dartmouth one was, when I
14 initially did this analysis in 2018 and then I did do an update
15 early in 2019, she'd just started at UVM it's been me
16 experience that new employees, at least initially for one, two
17 years get slightly above average wage increases, assuming they
18 prove themselves. So I used the 3 percent and to, I just
19 continued on using it, although, you know, probably to be
20 consistent I really probably should have used 2.5 percent
21 starting in 2005, but I didn't.

22 Q. But you using 3 percent instead of 2.5 reduces the loss of
23 Dr. Porter, right?

24 A. Yeah, because it increases her earnings at UVM. So, in
25 determining the 2025 earnings at UVM I had, there was two

1 operations. In July 1, because the raise, UVM is on a fiscal
2 year, July 1 to June 30th. So I assumed that she would get a 3
3 percent increase on June 1 of 2025, but, at that point, she
4 would go from an 80 percent part-time employment to a 75
5 percent, which that's really about a 6 percent reduction, and
6 so I reduced it by 6 percent. And then, going forward from
7 that, I used that number as a basis for a forecasting forward
8 with a 3 percent annual salary inflator that goes into effect
9 every July 1.

10 Q. I want to make sure I've got this right. So, going
11 forward, the assumption is that Dr. Porter would work at a .75,
12 75 percent of a full-time position, right?

13 A. Yes, starting in July 1 of this year.

14 Q. Right.

15 A. And so the next -- so that's how I developed the gross
16 earned income under the post-termination projections. The next
17 column over, it's fringe benefits, and for the only fringe
18 benefit I've included in here in this analysis is UVM's
19 contribution to a retirement plan, which is 9 percent. And
20 then the next column over would be 6. It is nothing more than
21 the addition of prior two columns, the gross earned income and
22 the fringe benefits, and so that's added up each one of the
23 years out through 2033.

24 Q. So that's Column 6, right, on your report?

25 A. Yes.

1 Q. All right. And what does Column 7 reflect?

2 A. Column 7 is another simple mathematical calculation, and
3 what it does is it takes the numbers from Column 3, the total
4 earnings for Dartmouth-Hitchcock, and then I subtract out the
5 total earnings under the post-termination projections. So it's
6 a, it's a, I subtract Column 6 from Column 3 to come up with
7 what I'm titling as the gross, and that's a key word, the gross
8 adjusted lost earnings.

9 Q. And then, going to the next column, which is --

10 A. Yes. The next column is I back out income taxes. And so
11 the premise here is that, if Dr. Porter had earned this
12 additional money at Dartmouth, she'd earned more at Dartmouth
13 than she would have at UVM, which she did for all the years
14 except for one, she would have to pay taxes on that money.

15 Q. Right.

16 A. So I estimated what would be a tax liability of earning
17 this additional money, and, and that calculation is based on
18 looking at the difference between Column 1 and Column 3.
19 Fringe benefits aren't taxable. You will notice that in one
20 year, the year 2021, it's not a negative number. It's a
21 positive number, because in that year, in 2021, she actually
22 earned more at UVM than she did at, or would have, my
23 projections of what she would have earned at Dartmouth. And
24 that's primarily because of no wage increases for 2000 and
25 2021.

1 So that's actually a credit that her, her taxes would have
2 been \$1,600 less. So it's a, I'm crediting her with that, if
3 you will. It offsets the other taxes that she would have had
4 to pay. So that's how I estimated Column 8 was estimating what
5 she, what she would have to pay in taxes, and in doing that I
6 look at what the income that I looked at, you know, prior tax
7 returns, and I look at what income she earned. Well, I know
8 what I'm projecting what her income, but then her husband's
9 income and what their taxes would be based on that, and then I
10 recalculate with the additional loss and see how much the taxes
11 would go up, and that's what Column 8 is measuring is the
12 additional taxes.

13 Q. Then what does Column 9 reflect?

14 A. That's a simple mathematical calculation there. It's
15 subtracting the income taxes from the gross adjusted lost
16 earnings. So it's a, I'm titling it tax adjusted lost
17 earnings.

18 Q. Right. This column reflects the income assuming that
19 Dr. Porter pays the income taxes owed on the additional amount,
20 right?

21 A. Yes. In each year if she earned higher income, she would
22 have to pay taxes on it, and so I'm backing those taxes out.
23 If you will, the numbers in Column 9 are what I believe she
24 should be made whole if she received those numbers depending on
25 which year you pick or, well, in each one of the years, and

1 there were no tax consequences of receiving a settlement.

2 Q. Sorry. So, if we could go to Column 10 which is entitled
3 "Present Value" --

4 A. Yes.

5 Q. -- what is that?

6 A. So what I'm doing there is I'm converting those numbers to
7 how much would be needed now to -- I'm not sure how to explain
8 this -- what the present value is, and there's two components
9 to that. One is the historical. So that's from 2017 up
10 through 2024 is historical. And the law in Vermont passed by
11 the legislature is that interest on past losses are to be
12 calculated at the rate of 1 percent per month simple interest.
13 So --

14 ATTORNEY COFFIN: Objection, Your Honor. We have to
15 approach for a second, please.

16 THE COURT: Yes.

17 (Bench conference begins.)

18 ATTORNEY COFFIN: I don't mean to slow things down,
19 but I think we need to clearly cross this bridge or figure out
20 what we're going to do. First of all, Dr. Bancroft shouldn't
21 be providing legal opinions about what the law in Vermont is,
22 and we ask that to be struck.

23 Secondly, the 12 percent interest statute that's, you
24 know, supported by case law only applies to a sum certain. I
25 would renew strenuously or our continued objection that, you

1 know, we do not have a sum certain that can be applied here,
2 and it really is the for the jury to determine based on
3 examination of the Witness what the proper interest rate to be
4 applied, if any, is and if anything that changed from the
5 August '24 report coupled to the change to the report last week
6 demonstrates that there is, you know, no way one could have
7 come up with a sum certain in this case.

8 THE COURT: Okay. So, if we strike his answer with
9 respect to his representation as to the law that Vermont
10 requires and then his testimony just talks about what interest
11 rate he applied, does that satisfy your concern?

12 ATTORNEY COFFIN: Yeah, that's fine, as long as the
13 way he answers it does not indicate there's some sort of rule
14 or authority for that but that he, in his expertise, applied 12
15 percent.

16 ATTORNEY VITT: That's fine. As Your Honor, I'm
17 sure, appreciates, we disagree, and I'm sure we'll brief this
18 at the appropriate point saying it's 12 percent in this
19 situation, period, but, for purposes of the testimony, saying,
20 you know, the Court will instruct the jury on the law or
21 however you want to do it is fine. And then, obviously, the 12
22 percent is included. So he's done that calculation. So I just
23 want to make clear that that's, he's included that calculation
24 in the information that appears on the report.

25 ATTORNEY COFFIN: Very good. And I would just ask

1 the ability, as described by the case law, to be able to
2 cross-examine him on that point.

3 THE COURT: Yes. So what I'll indicate then is that
4 I'm striking the last answer to the extent that it makes a
5 representation about what Vermont law requires. Is that --

6 ATTORNEY VITT: Fine with me.

7 ATTORNEY COFFIN: Yes. And then, you know, I will,
8 and I'm sure I can take care of it. That's good. Thank you.

9 THE COURT: Okay. Thank you. We're good.

10 (Bench conference ends.)

11 THE COURT: Okay. So, before we proceed, I am going
12 to strike the Witness's last answer to the extent that it made
13 a representation about what Vermont law requires with respect
14 to interest rate, okay? Mr. Vitt.

15 BY ATTORNEY VITT:

16 Q. Dr. Bancroft, without getting into what the law is, what
17 you did was you used 12 percent as the calculation for each of
18 these, for each year in the calculation, right?

19 A. Yes. So 1 percent per month.

20 Q. Per month? Okay, got it. And was there any other part of
21 the answer that you --

22 A. No.

23 Q. -- didn't get to in terms of calculating the present
24 value?

25 A. Present value? Yes. Going forward, what I want to do is

1 convert those numbers. Just the opposite of adding interest, I
2 want to convert them back to a present value, and, basically,
3 what I'm calculating there in each one of those years is how
4 much money would be needed right now to generate that, that
5 figure in that future year.

6 So I'm looking at, for instance, in order for -- let's
7 take the year 2033 because it's at the bottom of the page and I
8 can read it. In 2033 I'm estimating that the after-tax loss is
9 \$51,744. I'm, after calculating the present value of that, the
10 number is \$41,329, and what that's saying is that, if you take
11 \$41,329 and you invested it into a tax-free municipal bond
12 paying around 2.8 percent, that would generate, in the year
13 2033, \$51,744.

14 Q. Is this process or approach that you've just described
15 standard for economists who are trying to evaluate future
16 losses?

17 A. Yes, it is.

18 Q. And then you've got, I believe the next column is
19 settlement income tax, correct?

20 A. Well, the next, actually, the next column is the
21 cumulative present value --

22 Q. I'm sorry.

23 A. -- which is nothing more than a running total, just taking
24 the numbers from Column 10 and adding them up over time. And I
25 should point out that I think it's important to understand

1 that, if this was a personal injury case, in a personal injury
2 case, the award is not taxable. That would be -- the table
3 would end there. There wouldn't be -- the next two columns
4 would be, would not be necessary because the awards are not
5 taxable. But in an employment case, the awards are --

6 ATTORNEY COFFIN: Objection, Your Honor. Approach?
7 I think it's a legal issue.

8 THE COURT: Yes.

9 (Bench conference begins.)

10 THE COURT: Similar objection?

11 ATTORNEY COFFIN: Yeah, similar. I just don't think
12 he should be providing, you know, legal opinion. You can, you
13 can ask and he can answer the question based on sort of an
14 understanding that such-and-such.

15 THE COURT: Right. You can just ask him generally
16 about the fact that the settlement income tax figure -- so,
17 obviously, he should not be testifying as to the difference
18 legally between a personal jury case and an employment case,
19 but he can testify generally to the fact that he did do a
20 settlement income tax calculation.

21 ATTORNEY VITT: All right.

22 ATTORNEY SCHROEDER: I still feel like he's doing the
23 direct and the cross. I'm not quite sure what the question
24 was. I mean, we're trying to move this along. Not really
25 getting there with the long-winded answer that has nothing to

1 do with the question when he starts going off on personal
2 injury.

3 THE COURT: So he's not going to be talking about
4 personal injury.

5 ATTORNEY VITT: All right. That's fine.

6 (Bench conference ends.)

7 THE COURT: Yes, proceed.

8 BY ATTORNEY VITT:

9 Q. So the settlement income tax, I've got a quick question.
10 Can you explain the difference in taxes calculation when
11 they're paid each year versus in a lump sum?

12 A. Sure. Obviously, in calculating the taxes in Column 8,
13 I'm looking at one year, the loss in one year where, if you
14 move over to Column 11 where I have a cumulative total, I'm
15 looking at lumping several years together.

16 Q. Right.

17 A. And so it's critical to understand that in column the
18 present values in Column 10 are after-tax dollars because I've
19 already backed taxes out. So now, because it's taxable, I need
20 to calculate the taxes, and, because I'm getting so much more,
21 my taxes are going to be significantly higher.

22 I'll give you an example. If an individual has lost, has
23 lost, somebody caused somebody to lose \$50,000 a year for the
24 next ten years, the taxes on, for a single person, just federal
25 taxes -- lower for state taxes -- the taxes for that individual

1 would be about \$4,000. The federal tax would be about \$4,000.

2 Q. That's per year?

3 A. That's per year.

4 Q. All right.

5 A. So over the ten years they would pay about \$40,000. Now,
6 if they were to receive that \$50,000 for all ten years at once,
7 that's \$500,000 all at once. When they report that on their
8 income tax, they're going to be kicked up into the -- some of
9 them actually might be in the highest tax bracket, and in that
10 case, assuming they earned no other income that they were -- so
11 that, the tax on that would be, I think, about \$125,000, three
12 times higher than it would be if it was spread out over time.

13 And the higher the income is, the greater that difference
14 becomes. So that's what I, in calculating the settlement
15 income tax, I've had to estimate, determine what kind of taxes
16 Dr. Porter would have to pay if she was to receive a
17 settlement. And so Column 13 is the addition of the cumulative
18 values in 1 and the settlement taxes. So let me go through an
19 example in case there's some confusion.

20 Q. Go ahead.

21 A. So, in the year 2033 I'm estimating that the total
22 economic loss is \$1,787,722.

23 Q. That's if she works up to when she's 70?

24 A. Yes. I'm not saying that she would, but I'm just using it
25 as an example. So, if she was to be awarded that amount when

1 she filled out her income taxes in 2005, she would put that
2 down along with her other income, her income this year at UVM
3 and any investment income, plus her husband's in income.

4 I took that into account. I made an estimate of what
5 their income would be, what kind of taxes they would pay on
6 this income. And so what I'm now estimating is that, if she
7 was to get this award of \$1,787,000 on top of her other income,
8 she would have to pay \$878,000 in income taxes on that, that
9 over and above the income taxes she'd pay on her salary and her
10 husband's business income. And so, if you subtract the
11 \$878,000 from the \$1,787,722, you get cumulative present value
12 in that column for 2033 of \$909,722. And so it's my contention
13 that then she would be made whole.

14 Q. I want to make sure that the point you covered when we
15 were talking about the income taxes and the tax adjusted lost
16 earnings that's Column 9, right?

17 A. Yes.

18 Q. That column assumes that Dr. Porter has paid the income
19 taxes on that lost income, correct?

20 A. That's correct. Yes.

21 Q. All right. So the taxes have already been paid, and what
22 you're calculating is -- tell me if I got this right. You're
23 calculating the additional amount that would be incurred
24 because it comes in a lump sum at a later date?

25 A. That's correct, yes. What, getting all that income lumped

1 in one year, what the impact would be. Now, if excuse me. I
2 hope this doesn't complicate things, but, if she was to be paid
3 in each one of those years in the year that the loss occurred,
4 -- you'd have to go back to 17 --

5 Q. Right.

6 A. -- then there you could eliminate the Column 8, But that's
7 not the case. She's going to receive one payment. Assuming
8 she prevails, she's going to receive one payment, and so,
9 therefore, because of the marginal tax bracket, both federal
10 and state, significant tax consequences.

11 Q. Your last column reflects total economic loss, and the
12 amount through 2033 is what?

13 A. Yes. That's my projections of what her total economic
14 loss is. That takes into account what her present value
15 cumulative loss is, plus whatever, in each year, what the
16 income tax, income tax liability would be.

17 Q. Can you bring up the last page which is entitled
18 "Additional University of Vermont Employment-Related Costs"?
19 It's the last page of the exhibit.

20 COURTROOM DEPUTY: I don't have the ability to bring
21 it up here. You can -- can you put it up on the ELMO?

22 ATTORNEY VITT: I can put it up. Does that show up?

23 COURTROOM DEPUTY: Yes.

24 ATTORNEY VITT: Will that show up on all the --

25 COURTROOM DEPUTY: Yeah.

1 BY ATTORNEY VITT:

2 Q. I would like to direct your attention to the page of the
3 chart that appears on your screen there, at least I hope it
4 does.

5 A. Yes, I see it, yes.

6 Q. Okay. Tell me what that reflects, please.

7 A. It reflects the additional costs, employment costs that
8 Dr. Porter has incurred, basically by having to set up
9 housekeeping, if you will, in the Burlington area, Chittenden
10 area and that she has to commute and her husband are commuting
11 from their home in Norwich. The costs were provided by Dr.
12 Porter to me what her costs were.

13 For the first year or so when she was up here, she was
14 renting, and then they ended up buying a place. I didn't
15 include anything associated with the buying. But so she had
16 provided information on what she was having to pay utilities on
17 their house, well, in their apartment initially and then on
18 their house and then what they had to pay in heat, again, on
19 the rental unit and then on the house. And then the rent, she
20 provided me information on the rent.

21 Q. The rent's only for two years, right?

22 A. Beg your pardon.

23 Q. The rent is for two years?

24 A. Well, it's not even two years. It was a partial year in
25 2018. Well, both years were partial.

1 Q. Okay.

2 A. Both years were partial.

3 Q. And, when she bought a home or a condominium, there was
4 there was no rent component, correct?

5 A. That's correct, no rent component. And then, moving
6 across the table, the next two columns are travel, and that is
7 based on the number of miles that Dr. Porter represented to me
8 that she traveled on a weekly basis, monthly basis -- I scaled
9 it up to an annual basis -- traveled between Norwich and her
10 place in her condominium, well, in her rental unit, condominium
11 here in Chittenden County and also her husband assuming the
12 assumption. She said that he came up as much as she did.

13 So that's, those were the one, two, three, four,
14 categories of additional expenses, and so Column 6 is the
15 addition of those five. And then I go through the same
16 exercise that I talked about on the previous table of
17 determining the present value, the historical amounts from 2017
18 to 2024. That's, I'm using that 12 percent simple interest
19 rate figure and then going forward, 2005 out to 2033. I'm
20 discounting those numbers and discounting. The interest rate
21 that I'm using to discount that is based on tax-free municipal
22 bonds, Triple A value.

23 Q. You've got a number under the travel column. Do you see
24 that?

25 A. Yes.

1 Q. How do you come up with that number? What does it
2 reflect?

3 A. What I did was I took the mileage that Dr. Porter gave me
4 and multiplied it by the federal mileage rate over, in each one
5 of the years. I went and got the historical mileage rate in
6 each year, and I multiplied the mileage times that federal
7 mileage rate.

8 Q. And it appears to go up each year.

9 A. Beg your pardon.

10 Q. It appears to go up each year, the amount?

11 A. Yes. I used, in all the columns, I used an inflator of
12 2.5 percent, which inflation over this period has averaged
13 historically. If you look at the last, since the year 2000,
14 inflation has been increasing on average about 2.65 percent a
15 year, but I used 2.5. The mileage rate has increased at around
16 3.2 percent. Average increase has been around 3.2 percent, but
17 I used the 2.5 percent inflator on this to be conservative.

18 So I forget where we were, but so I determined the present
19 value, and then if you want me, the last column is a running
20 total.

21 ATTORNEY VITT: Excuse me a second, Your Honor.

22 THE COURT: Yes.

23 ATTORNEY VITT: Nothing further, Your Honor.

24 THE COURT: Okay. Cross-examination?

25 ATTORNEY COFFIN: Thank you, Your Honor. Give me a

1 moment to make the move here.

2 THE COURT: Yes.

3 CROSS-EXAMINATION BY ATTORNEY COFFIN

4 Q. Good morning, Dr. Bancroft.

5 A. Good morning.

6 Q. Are you able to get a drink water and clear your throat a
7 little bit? Good.

8 A. I just did. Hopefully it will work.

9 Q. Perfect. Thank you. Good to see you again. You've been
10 qualified as an expert economist many times, isn't that right?

11 A. Yes.

12 Q. And, particularly, your credentials that we went through a
13 little bit with plaintiff were that you got a BA in economics
14 at UVM in '74, right?

15 A. Yes.

16 Q. And then you got a masters in agricultural economics at
17 UVM in '76; is that right?

18 A. Yes.

19 Q. And then you got a PhD in agricultural economics from
20 Purdue in 1981; is that correct?

21 A. Yes.

22 Q. And you served as a policy analyst at USDA for a time in
23 the 70s and 80s before your PhD was awarded; is that right?

24 A. Yes.

25 Q. Okay. And that was essentially analyzing agricultural

1 economic policy?

2 A. Well, it wasn't, it wasn't analyzing actual policy. It
3 was developing an econometric statistical model, a forecasting
4 model.

5 Q. Okay. For agricultural?

6 A. Agricultural, yes. Yeah.

7 Q. Okay. And then you had an assistant professorship from
8 August 1981 to July of 1991 in the department of agricultural
9 and resource economics at UVM; is that right?

10 A. Yes.

11 Q. Okay. Again, oriented towards agricultural economics,
12 isn't that right?

13 A. Well, some of it was, but not all of it.

14 Q. Okay. But you were in the department of agricultural and
15 resource economics?

16 A. Yes, I was. There was a small business program.

17 Q. It says that on your CV, right, that you were in the
18 department of agricultural and resource economics?

19 A. Yes.

20 Q. Okay. And then you were an adjunct professor in the
21 department of community development and applied economics at
22 UVM from 1992 to 1996; isn't that right?

23 A. I think from July of '91 when I left UVM into 1996.

24 Q. Okay. Now, throughout that time, though, your primary
25 role has been to be an economic consultant in litigation; isn't

1 that right?

2 A. Well, during the first -- it grew from --

3 ATTORNEY VITT: Objection, Your Honor. Can he finish
4 the answer, please?

5 THE COURT: He's rephrasing the question.

6 BY ATTORNEY COFFIN:

7 Q. Yeah, I'm just trying to expedite things. I should have
8 said, since about 1986 to present, your primary role in
9 economics has been as an economic litigation consultant; isn't
10 that right?

11 A. Yes, but that '86 to '91 I would say that my earnings at
12 UVM were equivalent to what I was earning in consulting. I
13 might have earned a little bit more in consulting, but,
14 basically, but then after '91 that really did become the
15 predominant source of my income.

16 Q. So, basically, from 1991 until the present, your primary
17 income as a consulting litigation witness; isn't that right?

18 A. Well, over that year -- so the, the consulting income, the
19 majority of it -- I'm going to say -- I don't know what the
20 percent is -- 80 percent came from forensic, but I did a lot of
21 other types of consulting over those years that were
22 nonlitigation types of work.

23 Q. My question was -- it will go quicker if you answer my
24 questions -- is, from 1986 to the present, the majority of your
25 income has been made by being an economic litigation

1 consultant; isn't that right?

2 A. Yes.

3 Q. Now, am I correct that you've worked on, as of the time
4 you were deposed in this case in 2019 -- there's been some
5 hiatus -- but you gave a figure of about 2,500 cases at that
6 time you'd served as a litigation witness?

7 A. That's my estimate back then, how many cases I worked on.

8 Q. And so that's going back now, like, 30 years or so; is
9 that right?

10 A. Back to my first litigation case was in 1982.

11 Q. Okay. So however long that is, right?

12 A. Yes.

13 Q. Quite a long time?

14 A. Yes.

15 Q. Okay. And how much do you charge per hour for your work
16 as a litigation consultant?

17 A. Today, I assume?

18 Q. Yes.

19 A. \$400 an hour.

20 Q. Say that again.

21 A. \$400 an hour.

22 Q. Okay. And since, you know, about 2010 to the last time
23 your rates changed, were they the same, or how did they differ?

24 A. They've grown.

25 Q. In say 2010 to 2025, how would you describe your rates

1 other than they've grown?

2 A. I don't remember what they were in 2010, but I'm going to
3 say maybe they were around 200.

4 Q. About 200?

5 A. I'm, I don't know that for sure, but --

6 Q. \$200 an hour?

7 A. \$200 an hour, yes.

8 Q. Do did you charge a difference for court testimony or
9 deposition testimony and review or --

10 A. No. It's the same rate across for everything I do except
11 for travel, and I basically charge half rate for travel.

12 Q. Okay. And, between 2000 and 2010, were your rates the
13 same as during the later period of 2010 to 2020?

14 A. No. My rates were, but may I go back to the previous
15 question? I should point out that, recently, in the last four
16 or five years, I, my rate for depositions is, is half again as
17 higher than my regular rate. That's to take account of
18 reviewing the depo, deposition.

19 Q. Okay. Meaning it's more than \$400 an hour?

20 A. Yes. It would be \$600 an hour. I used to charge for both
21 the deposition time and reviewing it, and so now I just,
22 instead of having to put in the time for reviewing it.

23 Q. Okay. So, currently, you charge \$400 an hour for your
24 work on the case, right?

25 A. Yes.

1 Q. For deposition testimony it's \$600 an hour; is that right?

2 A. Yes. Now it is.

3 Q. How about trial testimony?

4 A. \$400.

5 Q. \$400? Okay. And, you know, to the best you can kind of
6 reconstruct it from about 2000 to 2010, what were your hourly
7 rates?

8 A. 2000 to 2010? I don't know.

9 Q. \$200 an hour?

10 A. Well, I said that I'm guessing that in 2010 they were
11 \$200, but I don't remember what they were in 2000.

12 Q. Can you give me an approximation?

13 A. Yes. Somewhere between 150 and 50.

14 Q. Okay. So your testimony here today is, from 2000 to 2010,
15 your expert witness rates were somewhere between \$50 and \$150?

16 A. I'm guessing. I don't know what --

17 Q. Could it be that they were higher than that?

18 A. It might have been, yeah. I think you have a bill that I
19 submitted to, to in this case that goes back to 2019, and on
20 that has my hourly rate. I don't remember offhand what it is,
21 but you have it.

22 Q. Okay. About how many cases would you estimate you've
23 served as an expert witness on?

24 A. Well, as I indicated, it's probably closer to 3,000 now.
25 Back when in 2019 when my deposition, I was saying

1 approximately 2,500. I have not kept a, you know, an itemized
2 number. I am estimating.

3 Q. This is a question that you're asked regularly in
4 depositions, though, isn't it?

5 A. No, not necessarily, no.

6 Q. Not necessarily?

7 A. No.

8 Q. But regularly?

9 A. Actually quite seldom.

10 Q. Say that --

11 A. Quite seldom am I asked about the number of cases I worked
12 on.

13 Q. So in the 3,000 or so cases you've done, that's a question
14 that's asked seldomly? That's a question you're seldom asked
15 in depositions?

16 A. Yeah. That's, yes.

17 Q. And about how many times have you given a deposition out
18 of the 3,000 cases you've served as an expert consultant?

19 ATTORNEY VITT: Could Mr. Coffin closer to the
20 microphone? It's a little hard to hear.

21 ATTORNEY COFFIN: Maybe I'll turn it this way.
22 Apologize. Thank you. Sorry. Sometimes I can be a low talker
23 too.

24 THE WITNESS: I wouldn't have the foggiest idea over
25 that from '82 to present how many depositions I've given, but

1 there have been many.

2 BY ATTORNEY COFFIN:

3 Q. Would you say thousands?

4 A. No, I wouldn't say thousands.

5 Q. High hundreds?

6 A. I don't know if I'd go high hundreds, but I'd certainly
7 say it's well into the hundreds.

8 Q. Okay. And am I correct that you do about 75 percent of
9 your work for the plaintiff's side in your litigation
10 consulting?

11 A. Yeah. Yes. Currently, that's what it is. If you went
12 back to -- if you looked at the longer period of time, it would
13 be slightly less for plaintiffs. Back in the 90s if you asked
14 me that question, I would say that it was 65 percent defense.

15 Q. But for, like, the last 20 years, about 75 percent
16 plaintiffs?

17 A. I'd say the last 20 years about 75 percent, yes.

18 Q. Okay. And the work that you do is all sorts of
19 plaintiff's side litigation; is that right?

20 A. Well, I do defense work too.

21 Q. And so some defense work? Fair enough, okay.

22 A. Yeah.

23 Q. But it's the broad spectrum of litigation; is that right?

24 A. Yes. Predominantly personal injury, wrongful death,
25 employment cases, and lost business profits, and then there are

1 a couple of other types in there.

2 Q. More unusual types?

3 A. More unusual.

4 Q. And am I correct that about 20 percent of your litigation
5 consulting work in the last 10 or 15 years has related to
6 employment claims?

7 A. I would think that's a reasonable estimate. Again, I
8 haven't kept count of it, but it's a reasonable estimate

9 ATTORNEY COFFIN: We're not publishing anything. I
10 wanted to display for the parties Dr. Bancroft's December 30,
11 2024 invoice preliminary to its introduction.

12 COURTROOM DEPUTY: Just the parties? Who should be
13 seeing this?

14 ATTORNEY COFFIN: Oh, I'm sorry. Witness, judge, and
15 litigants.

16 COURTROOM DEPUTY: Oh, okay. Thank you.

17 BY ATTORNEY COFFIN:

18 Q. Dr. Bancroft, you mentioned an invoice for your work
19 previously. I'm showing you a document dated December 30th
20 2024 which is a unsigned letter from you to Geoffrey Vitt.
21 Does that appear to be an invoice for work you've done on this
22 case?

23 A. Yes.

24 ATTORNEY COFFIN: We'd move its admission, Your
25 Honor.

1 THE COURT: Any objection?

2 ATTORNEY VITT: No objection.

3 THE COURT: Okay. It's admitted.

4 ATTORNEY COFFIN: If we could publish to the jury,
5 please.

6 THE COURT: Yes. Do we have an exhibit number for
7 that?

8 ATTORNEY COFFIN: I'm not sure we do. C18, Your
9 Honor.

10 THE COURT: Okay. Defendant's C18 is admitted.

11 BY ATTORNEY COFFIN:

12 Q. Okay. Dr. Bancroft, is this an exhibit or, sorry, an
13 invoice for work you've done on this case?

14 A. Yes.

15 Q. And by an invoice it describes generally the nature of the
16 work you've done and the amount you've done and charged for the
17 case; is that correct?

18 A. Yes.

19 Q. And I note that it's not signed.

20 A. No.

21 Q. What do you make of that?

22 A. Well, you requested a copy of the file, and I went in my
23 computer and printed it off, but, when I sent one out, it was
24 signed.

25 Q. Okay, okay. When did you print this out and provide it?

1 A. This one was printed out last, sometime last week.

2 Q. Okay. So scrolling up, please, the date on this is
3 December 30th 2024, right?

4 A. Yes.

5 Q. And so that describes work that you've done this calendar,
6 in the calendar year of 2024; is that right?

7 A. It turns out it was all done in '24.

8 Q. It turns out --

9 A. Everything was done, in this particular case, everything
10 was done in '24.

11 Q. Okay. And by that you mean everything that was done was
12 done in '24, you know that you issued three prior reports in
13 this case. They were done in '24? I'm not following.

14 A. No, no. All I'm saying is that many times the bills that
15 I send out may include a couple of years. This one only
16 included time that I spent in 2024.

17 Q. Okay. I see what you're saying. Okay. So this describes
18 accurately the work you've done on the case and did in the case
19 in 2024 then?

20 A. Yes.

21 Q. And this work involved \$6,650 worth of work; is that
22 right?

23 A. Yes.

24 Q. And the reports that you generated in 2024 were one dated
25 August 26th 2024; is that right?

1 A. Yes.

2 Q. And so this would be the work that went into that report;
3 is that correct?

4 A. Yes. Yeah. I was -- I had, was contacted by Mr. Vitt in
5 the first part of 2024, and I had thrown my file away.

6 Q. Okay.

7 A. So I had to resurrect my file. I had to, if you will,
8 kind of reinvent the wheel.

9 Q. Okay. You had thrown your work file away; is that what
10 you're testifying here today?

11 A. Yes, yes. I had my electronic file, but I had a file
12 with some notes in it from over the years, and I, after not
13 hearing anything for five years, I assumed the case had, had
14 gone away, and I had a house fire last April, and I believe it
15 may have gotten destroyed then too.

16 Q. Okay. But you don't have your original work file in this
17 case; is that what you're telling me?

18 A. I don't have those original handwritten notes, no.

19 Q. And we didn't receive in discovery any other invoices for
20 your work in this case. How come?

21 A. When Mr. Vitt asked me to print out my invoices, I thought
22 I'd printed out both of them. It appears what I did was I
23 printed out this one twice, but I provided him today with the
24 invoice from 2019.

25 ATTORNEY COFFIN: Okay. I hate to do this, Your

1 Honor, but could we approach, please?

2 (Bench conference begins.)

3 ATTORNEY COFFIN: I truly don't want to take more
4 time than we need to, but this document was specifically
5 requested. It was requested in discovery. Should have been
6 produced then. It was requested in seriatim many times over
7 the last few days, and for me to be hearing from this witness
8 on the stand that Mr. Vitt has a copy of this and it wasn't
9 provided to us is, shall I say, extremely surprising.

10 THE COURT: Mr. Vitt?

11 ATTORNEY VITT: I just got this this morning. I
12 don't -- Your Honor, this is a bill for \$2,648 going back to
13 November of 2019. I don't see this as a particularly shocking
14 or surprising document, you know, and I'm not sure it was
15 requested either, but we're certainly not hiding the ball.

16 THE COURT: So, Mr. Vitt, I received this document
17 this morning from your witness, but you didn't provide it to
18 opposing counsel?

19 ATTORNEY JONES: He literally handed it to me as he
20 was walking to the stand. I didn't have a chance to give it to
21 Mr. Vitt or do anything because the jury was seated, and we
22 were walking to the stand. I was hoping for a break.

23 ATTORNEY COFFIN: Just to be really clear, it's not
24 really so much the size of the document that's the issue. You
25 know, I asked many Mr. Vitt -- Sorry. Sometimes I can be a

1 loud talker.

2 THE COURT: A little less loud.

3 ATTORNEY COFFIN: I asked Mr. Vitt and Mr. Jones
4 specifically about this. Mr. Jones deferred me to Mr. Vitt. I
5 followed Mr. Vitt last week, had, you know, some
6 back-and-forths with him, was told by him on Friday, Oh,
7 there's only this one invoice, there aren't other invoices,
8 which was different than what he had told me before. And so,
9 you know, I'm just surprised that, given the weekend's work on
10 these, briefing these issues, given the hour-long conference on
11 these issues today, to find this out on direct examination of a
12 witness. But this is what it's been like for this witness, and
13 it's not okay.

14 THE COURT: Okay. So this is the same line of
15 questioning, obviously, for this witness. I hear your
16 objection. I agree. I'm not sure why this wasn't turned over
17 before. That's not acceptable. The request was made. It
18 wasn't disclosed. I'm not hearing a good reason why it wasn't
19 disclosed.

20 That said, it's impeachment of this witness along the same
21 lines of what you're doing now. I'm happy to give you a break
22 if you want to review this. We're coming close to a break.
23 You know, I want to allow you make to make full use of this if
24 that's what you'd like to do.

25 ATTORNEY COFFIN: Sure, yeah. I haven't seen it yet.

1 Just looking over his shoulder, it appears to be something that
2 I can absorb quickly and incorporate quickly. It's 10:30. If
3 the Court wants to take a break, I'm totally good with that.

4 THE COURT: Why don't we take the morning break, and
5 then you can take a look at that?

6 ATTORNEY COFFIN: Can I get a copy?

7 ATTORNEY VITT: You can have this one.

8 ATTORNEY COFFIN: Oh, this is for me? Okay.

9 THE COURT: Okay.

10 (Bench conference ends.)

11 THE COURT: Okay. At this time, we're going to take
12 our morning break. So I will see you back here at 10:40.

13 (A recess was taken from 10:27 a.m. to 10:42 a.m.)

14 THE COURT: Okay. Anything to take up before I bring
15 the jury back?

16 ATTORNEY COFFIN: No, Your Honor. Thank you.

17 THE COURT: Okay. Plaintiff?

18 ATTORNEY VITT: No.

19 THE COURT: Okay.

20 (The Jury enters the courtroom.)

21 THE COURT: Mr. Coffin?

22 ATTORNEY COFFIN: Thank you, Your Honor.

23 BY ATTORNEY COFFIN:

24 Q. Good morning, Dr. Bancroft.

25 A. Good morning.

1 Q. When we took a break, I was asking you about invoices you
2 prepared in this case, right?

3 A. Yes.

4 Q. And I think you mentioned that you had thrown out your
5 entire file for this case because you thought the case was
6 over; is that right?

7 A. Yes.

8 Q. And you mentioned that there was a fire at your house?

9 A. Yes.

10 Q. Which I apologize for that. I'm sorry for you. You're
11 not sure whether these, the file was destroyed in that fire,
12 were you?

13 A. No, I'm, I'm not sure. When I first was contacted about
14 the case, I knew that I -- I went and looked at the electronic
15 file, and then sometime after that, a month or two months, I
16 said, Well, I'll see if I can find the paper file, the notes
17 that I had, and I wasn't able to find it.

18 Q. Okay. I'd ask you to please answer my yes-or-no questions
19 with a "yes" or "no" if you can, please. So the bottom line is
20 you know your file disappeared; is that right?

21 A. Yes.

22 Q. And you don't -- you're not saying it was because of the
23 fire here today?

24 A. No, I'm not saying it's because of the fire.

25 Q. And it sounded from the import of your answer, but I want

1 to probe you jut a second on that, is you think that you
2 thought the case was over so you got rid of those materials?

3 A. Yes.

4 Q. But, at Mr. Vitt's request, you dug up two invoices
5 related to the case; is that right?

6 A. Yes.

7 Q. And one was the one we admitted into evidence December
8 30th 2024, correct?

9 A. Yes.

10 Q. And there was another one that you provided to Mr. Vitt
11 dated November 19th 2019; is that correct?

12 A. I believe that's correct, yes, the date.

13 ATTORNEY COFFIN: Your Honor, I'd ask that the
14 document that the Witness provided and attorneys provided that
15 we had a sidebar on be introduced into evidence at this time,
16 and let's call it C18-A.

17 THE COURT: Okay. Any objection?

18 ATTORNEY VITT: No objection.

19 THE COURT: Okay. C18-A is admitted.

20 ATTORNEY COFFIN: And, with the Court's permission
21 and help from the deputy clerk, I'd like to display it on the
22 ELMO.

23 THE COURT: Yes.

24 BY ATTORNEY COFFIN:

25 Q. And so this is an invoice, is it not, Dr. Bancroft, for

1 \$2,628 for work you've done on this case; is that correct?

2 A. Yes.

3 Q. And it lists the dates and the nature of the work you did;
4 is that right?

5 A. Yes.

6 Q. Okay. Specifically, it says, "Economic analysis,
7 consultation, and report update, \$1,352". Is that what it
8 says?

9 A. Yes.

10 Q. And noting the billable hour was \$260 an hour; is that
11 right?

12 A. Yes.

13 Q. So down from the \$350 an hour you were charging in your,
14 under the prior invoice; is that right?

15 A. I'm sorry.

16 Q. That's less than the \$350 an hour you charged in your 2024
17 invoice that we looked at, right?

18 A. Yes.

19 Q. Okay. Now, it says report update, doesn't it?

20 A. Yes.

21 Q. And that would imply that there was work done on a report
22 prior to this that wasn't a report update, wouldn't it?

23 A. There were two reports that I generated.

24 Q. Well --

25 A. The last one -- well, that --

1 Q. There were four reports that you generated, right?

2 A. Yes.

3 Q. Okay. And what I think you're saying is that this bill is
4 meant to reflect the work done on one of those reports; is that
5 right?

6 A. No.

7 Q. Okay. And there was another report that was done in 2018;
8 is that right?

9 A. Yes.

10 Q. Okay. And this report -- strike that.

11 Does this invoice cover and bill for the work done on the
12 initial report in 2018?

13 A. Yes.

14 Q. Okay. And so --

15 A. At least I was not able to find in my billing file another
16 invoice.

17 Q. Okay. Are you here today testifying that you're sure you
18 sent an invoice as to that 2018 report or that you didn't?

19 A. I don't remember.

20 Q. One way or the other?

21 A. Yeah. Because it's not in the file, my computer file, I
22 would suspect that this covers both reports.

23 Q. Even though it says it's a bill for a report update?

24 A. Yes.

25 Q. Okay. So the billings you've sent to Mr. Vitt in this

1 case are this bill that's on Exhibit 16A for --

2 THE COURT: I think it's 18A.

3 BY ATTORNEY COFFIN:

4 Q. I apologize. 18A, right?

5 A. Yeah.

6 Q. And the amount that you provided for \$6,650 on C18, is
7 that right?

8 A. I believe that's correct.

9 Q. And so those cover three of the four reports that have
10 been done in this case, correct?

11 A. Yes.

12 Q. And now you issued another report more recently; is that
13 right?

14 A. Yes.

15 Q. The one that has been introduced into the, well, the
16 report, the chart that has been introduced into evidence
17 earlier through Mr. Vitt; is that correct?

18 A. Yes.

19 Q. And you haven't submitted an invoice yet for that work; is
20 that right?

21 A. That's correct.

22 Q. You plan to, though?

23 A. Yes.

24 Q. And for your time here today; is that correct?

25 A. Yes.

1 Q. Now, so we've got for three reports, a tick under \$10,000;
2 is that right?

3 A. Yes.

4 Q. And, with another report coming, that would be another 3
5 or \$4,000, estimated, with your testimony time?

6 A. Maybe. I don't know. I don't know. I haven't written
7 the time down, but that seems high, but I don't know.

8 Q. What would you approximate it as?

9 A. I don't know. I just don't remember the amount of time
10 I've got put in, and I've been down to the courthouse here
11 several times.

12 Q. So that would strike me as maybe it's higher than --

13 A. I don't know. It's, I --

14 Q. Just guessing, you can't estimate?

15 A. No.

16 Q. Okay. So, if I said that the, suppose that that report
17 will be worth \$5,000 when that invoice is in, would you argue
18 with me about that?

19 A. Yeah, I would. I hope it is, but I'm sure it is.

20 Q. Okay. \$2,500, how about that?

21 A. It's probably at least \$2,500.

22 Q. Okay. At least \$2,500. So the work that you've done in
23 the case for the three reports and the report you've done now
24 is about \$12,000; is that right?

25 A. Yes.

1 Q. Okay. So you've worked on about 3,000 of these cases over
2 the years?

3 A. I've been involved in about 3,000 litigation cases, yes.

4 Q. And I presume that a \$10,000, \$12,000 bill is on the high
5 end of the report and billing services that you charge; is that
6 fair to say?

7 A. Extremely high.

8 Q. Okay. And more average is about 4 or \$5,000?

9 A. No, less than that.

10 Q. Okay. \$3,000?

11 A. Less than that.

12 Q. \$2,000?

13 A. Between 2 and now, with my current rates, it's between 2
14 and 3,000 for a normal wrongful termination case.

15 Q. Okay. So, if we called it 3,000 to make math simple,
16 3,000 times 3,000 cases --

17 ATTORNEY VITT: Objection. Can we approach the
18 bench?

19 ATTORNEY COFFIN: Equals --

20 THE COURT: He's in the middle of a question, but
21 come on up.

22 ATTORNEY COFFIN: Well, if I can finish the question
23 -- equals \$9 million?

24 THE COURT: Okay.

25 THE WITNESS: No, that ain't no \$9 million. You're

1 multiplying my rate now to what I got back in '82?

2 BY ATTORNEY COFFIN:

3 Q. I asked you what your average case was, and I think you
4 said \$2,000 to \$3,000. So the exact question, Doctor, is,
5 What's 3,000 times 3,000?

6 ATTORNEY VITT: Objection.

7 THE WITNESS: Maybe I misunderstood you. I thought
8 you were talking about how much I would be a normal case today.
9 I can't tell you what a normal case was 25 years ago, what the
10 bill was. Today, a wrongful employment case is going to be
11 somewhere, assuming there's nothing unusual in the case and I
12 don't have to spend a lot of time on the phone, it's going to
13 be somewhere between 2 and \$3,000.

14 THE COURT: So there's a request for a bench
15 conference. Is that still the request?

16 ATTORNEY VITT: Yes, please.

17 THE COURT: All right. Please approach.

18 (Bench conference begins.)

19 ATTORNEY VITT: Your Honor, I understand that counsel
20 gets considerable latitude, but going back this far, and,
21 basically, I'm not even sure what the argument is. 25 years of
22 work, how much do you charge in each one, trying to come up
23 with some sort of number. What is the point that this is
24 driving toward? I don't understand it.

25 ATTORNEY COFFIN: It's driving towards the obvious

1 point that he's fiscally biased because of the millions of
2 dollars he's made through his expert analysis, and it's totally
3 appropriate, relevant cross-examination on, Are you unbiased?
4 And Dr., Mr. Vitt can ask his questions to clarify it, even
5 though, I would say, just like Dr. Bancroft has expanded beyond
6 my cross to provide a lot of his rationale as well.

7 THE COURT: It's valid on cross-examination. I'll
8 allow it. You can ask him questions on redirect.

9 (Bench conference ends.)

10 BY ATTORNEY COFFIN:

11 Q. Okay. Again, my questions, I think, will go more quickly
12 if you answer "yes" or "no", please, to them. You estimated on
13 direct that sort of your average case in recent times, maybe
14 not going back to the 1980s, but recent times was \$2,000 to
15 \$3,000 a case; isn't that right?

16 A. No.

17 Q. You didn't? Okay. And you estimated that you'd done
18 about 3,000 cases; isn't that right?

19 A. Yes, since '82.

20 Q. So, if you'd done, your average for a case was \$3,000 a
21 case and you've done 3,000 cases, what would that be in terms
22 of the amount of compensation you've received from doing these
23 cases?

24 A. Well, if you did that calculation, if that was correct,
25 that would be a lot of money, and I'm sure, if I'd earned

1 \$3,000 in each one of those cases, I'm pretty sure I wouldn't
2 be here now.

3 Q. Well, you know the math is the math, right? So 3,000
4 times 3,000 is what, \$9 million?

5 A. You are twisting this around. I did not charge --

6 THE COURT: Dr. Bancroft, I'll direct you to answer
7 the question, please.

8 THE WITNESS: I did not charge \$400 an hour back in
9 1982. My charge in '82 was probably well less than \$50, and
10 it's grown over that period of time.

11 BY ATTORNEY COFFIN:

12 Q. We've had testimony significantly about your rates and
13 case work in the 2000s, and I'll ask you again. If your
14 average remuneration for a case was \$3,000 and you'd done 3,000
15 cases, wouldn't be that be \$9 million?

16 A. I'll take your word for it, but I haven't earned anywhere
17 near that, not anywhere near that.

18 Q. Now, you have worked with Attorney Vitt before?

19 A. Yes, I think one time before.

20 Q. Okay. And what was the nature of that case?

21 A. I believe it was an employment case.

22 Q. Was it also an employment case involving my client,
23 Dartmouth-Hitchcock?

24 A. I don't remember.

25 Q. Okay. It was an employment case where you were asked to

1 provide opinions related to a resident who was terminated from
2 the residency program; is that correct?

3 A. I don't know. I said I don't know if it was against
4 Dartmouth or not, so I can't answer the question.

5 Q. And do you recall a judge ruling on your opinions in that
6 case?

7 A. No.

8 Q. No. You don't recall the judge excluding your opinions
9 based on improper speculation?

10 ATTORNEY VITT: Objection. Can you repeat the
11 question, please? I'm sorry.

12 BY ATTORNEY COFFIN:

13 Q. Do you recall a judge ruling your opinions were not to be
14 admitted due to improper methodology and speculation on your
15 part?

16 A. No. I remember that there was one time that it was not
17 allowed in because it was too, the disclosure was too late.

18 Q. And so that's the only case you've worked on with
19 Mr. Vitt; is that right?

20 A. That's the only one I remember.

21 Q. Oh, okay. Think hard. Can you remember any others where
22 you've worked with him as a retained expert witness in his -- I
23 don't know -- 20-plus years of practicing law?

24 A. I'll think real hard on it. That's the only one I
25 remember.

1 Q. Okay. How about the firm Langrock Sperry; have you ever
2 done work for them?

3 A. Yes, a lot.

4 Q. A lot of work for them?

5 A. Yes.

6 Q. Okay. And Langrock Sperry is the firm that Mr. Jones is a
7 partner at; is that right?

8 A. Yes.

9 Q. And what do you mean by doing a lot of work for them?

10 A. Well, over the years, I think probably I go back into the,
11 you know, in the 90s and maybe into the 80s that I had some
12 cases with them. But, over the years, I've had some cases with
13 them, and I suspect it's less than 20, but maybe more than 10.

14 Q. Less than 20 and more than 10?

15 A. Over a 30-some-odd-year, 40-year period.

16 Q. Okay. And same assumption. Assuming you're charging
17 three, just to make the math easy, \$3,000 per case and you've
18 had 20 cases or so with them, that firm; is that right?

19 A. I've had 20 -- I don't know if it's 20 cases or not, but
20 I'm --

21 Q. You're estimating?

22 A. I don't know. I think it's probably somewhere between 10
23 and 20.

24 Q. So we'll call it 15, 15 cases with them where you've made
25 \$3,000 a case?

1 A. No.

2 Q. That comes out to about -- well, or your average case, if,
3 if you assume it's \$3,000 a case, and you fight that
4 assumption, but let's, for the sake of discussion, assume that
5 it is. You would have made some \$45,000 on cases from Langrock
6 Sperry; is that fair to say?

7 A. No, nowhere close to that, because the average over the 40
8 years that I have worked and done cases for Sperry Langrock,
9 the average value was not \$3,000. And I'm not sure that I ever
10 had a case with Sperry Langrock that had to do with employment.

11 Q. Okay. Now, do you have any cases with Mr. Vitt's firm
12 other than this now?

13 A. No.

14 Q. And how about with Langrock Sperry?

15 A. I don't think I do, but there's one that I haven't thrown
16 the file away. It's been a couple years since I've heard
17 anything about it, so I'm not sure if it's still active.

18 Q. Now, you described that about 20 percent, maybe 25 percent
19 of your cases are employment discrimination cases, correct?

20 A. In recent years, yes.

21 Q. Now, we had a hearing last week where I asked you a bunch
22 of questions about things. Do you remember that?

23 A. Yes.

24 Q. And do you recall me asking you some questions about your
25 work on academic medical cases involving the transfer of a

1 physician from one academic medical institution to another?

2 A. Vaguely. I think that was a topic, but I don't remember
3 much about it, but --

4 Q. Okay. Do you remember testifying that you had maybe one,
5 maybe two of those cases in your experience prior to this?

6 A. An employment -- let me make sure I understand you. An
7 employment case where we're dealing with a doctor in a
8 hospital, is that --

9 Q. Yes, transferring employment.

10 A. I think that's probably fair. I don't remember, but I'm
11 going to say it's probably at least maybe three.

12 Q. You wouldn't fight me if you said at the hearing it was
13 one, maybe two?

14 A. Well, maybe. I don't remember, so --

15 Q. Now, you prepared four reports in this case; isn't that
16 correct?

17 A. Yes.

18 Q. And am I correct that one was on October 30th 2018? Is
19 that correct?

20 A. I'll take your word for it, yes.

21 Q. And, in all of the reports, you have a chart similar to
22 the chart that's been introduced here today or shown to the
23 jury today. It's not in evidence yet, but shown to the jury
24 today, right?

25 A. Yes.

1 Q. And the right column is kind of the ultimate loss column
2 where it says "Total Economic Loss"; is that fair to say?

3 A. Yes.

4 Q. And it's divided up by years; is that right?

5 A. Yes.

6 Q. Now, in the October 30, 2018 report, do you agree that you
7 calculated the total economic loss there in this case for as
8 \$3,000,022?

9 A. I'll take your word for it. I don't have it in front of
10 me.

11 Q. Okay. And how about would you take my word for it that,
12 on October 19, 2019, you calculated the loss at \$4,835,000?

13 A. I'll take your word for it.

14 Q. Similarly, August 26th 2024, would you take my word that
15 you calculated a loss of \$4,329,258?

16 A. I'll take your word for it.

17 Q. And then, most recently on March 19th, last Tuesday, you
18 calculated a total economic loss of \$1,787,722; is that right?

19 A. Yes.

20 Q. That's right?

21 A. Yes.

22 Q. So your loss figures dropped by almost \$2.6 million
23 between August 26, 2024 and your most recent report last week;
24 isn't that right?

25 A. Dropped how much?

1 Q. About \$2.6 million.

2 A. Okay. I'll take your representation, yes.

3 Q. Well, do you agree with that?

4 A. I don't, I don't have them in front of me so I can't tell
5 you, but I'll take your word for it.

6 Q. Do you want me to put it in front of you?

7 A. Sure.

8 Q. Can you show him --

9 (Brief pause.)

10 Let me keep going. We can circle back to this. In any
11 event, I'll refresh your recollection with it, but I don't hear
12 you saying that you disagree with my assertion that your August
13 26, 2024 report had a total economic loss of \$4,328,258.

14 A. No. I think that's in the area, yeah. I know it was, it
15 was much larger than this one.

16 Q. Okay. And so the most recent report from last week
17 dropped it down to \$1,787,722. That sounds right?

18 A. Yes.

19 Q. Okay. And you report that you did most recently made
20 eight substantive changes from your report before; is that
21 right?

22 A. Yes.

23 Q. And four were due to new information, and four were due to
24 the passage of time?

25 A. Yeah, I think it's four and four. It might be five and

1 three. I think it's three and five, but I may have said four
2 and four.

3 ATTORNEY COFFIN: Okay. Can we please display the
4 March 19th 2025 report? It's been admitted for identification.
5 I believe that has been shown to the jury, hasn't it? I just
6 want to make sure I'm not --

7 THE COURT: Talking about the chart? The chart has
8 been.

9 ATTORNEY COFFIN: Okay. Not the report, but the
10 chart?

11 THE COURT: Right.

12 ATTORNEY VITT: Could we move for the admission of
13 that chart now? Will that be possible, or should I wait until
14 I redirect?

15 ATTORNEY COFFIN: Objection for reasons we've gone
16 over thoroughly.

17 THE COURT: I'll reserve ruling on that at this time.

18 ATTORNEY COFFIN: Please put it up for the Witness,
19 the judge, and myself, please.

20 COURTROOM DEPUTY: Hold on one second.

21 BY ATTORNEY COFFIN:

22 Q. Okay. Does everybody have it? Okay, good. Thank you.
23 Now, Dr. Bancroft, directing your attention to the screen, this
24 is your March 19th 2025 projected lost earnings for Dr. Porter
25 chart; is that right?

1 A. Yes.

2 Q. And you described the structure of the report as it goes
3 along on direct examination. Now, am I correct that your
4 reports as you generate them, all these reports, are based
5 significantly on what the plaintiff and her lawyers have told
6 you?

7 A. Yes, that and Dr. Porter, primarily on UVM side.

8 Q. Dr. Porter, what Dr. Porter and her attorneys have told
9 you; is that correct?

10 A. Yes.

11 Q. Like, in conversations, right?

12 A. Yes.

13 Q. In emails, right?

14 A. There probably was some emails. I'm not sure.

15 Q. Okay. It's not all based on sort of objective economic
16 financial information; isn't that right?

17 A. Well, I don't know. You'll have to talk with Dr. Porter
18 on this. What she's was basing it on, I don't know, but I took
19 her, I took her word that this is what her employment was going
20 to be in the future.

21 Q. Right. And so the point is the transmission to you is you
22 are relying on what she is telling you; is that correct?

23 A. Absolutely.

24 Q. You're basically a microphone for what she is telling you
25 is her career situation; isn't that right?

1 A. Well, I might put it a different way, but I'll stipulate.
2 I'll agree.

3 Q. And she's ultimately your client, isn't she?

4 A. Ultimately, I guess, yes.

5 Q. You're getting paid pretty well for providing her a
6 microphone for her views; is that right?

7 A. I am representing -- I was detained by her to estimate
8 what her losses were, yes.

9 Q. Well, one of the things that's embedded in your report is
10 the assumption that in 2019 she would become a full professor
11 at Dartmouth; isn't that right?

12 A. Yes.

13 Q. And that would have resulted in a 5 percent increase in
14 her salary at Dartmouth; is that correct?

15 A. Yes. Technically, it would have been a 2.5 percent
16 increase because there would have been a 2.5 percent normal
17 increase irrespective of being promoted.

18 Q. But it would be 5 percent for that year because of the
19 midyear timing of that; is that your point?

20 A. Yes.

21 Q. But, ultimately, the net from that is a 5 percent increase
22 for her for becoming a professor at Dartmouth, right?

23 A. Yes.

24 Q. And you're not on the credential committee or the
25 professor review committee or anything like that at Dartmouth,

1 correct? And so you don't know whether she can qualify to be a
2 professor at Dartmouth or not, right?

3 A. No, I did not look into it, no.

4 Q. No, because you relied on what she told you, right?

5 A. Yes, and I wouldn't -- I don't know how I'd even begin to
6 do it.

7 Q. Now, she ultimately wasn't selected to be a professor at
8 Dartmouth because her employment was terminated when the REI
9 division ended; isn't that right?

10 A. I don't know about that.

11 Q. Now, you did not include -- so the chart, just to kind of
12 make it simple for me anyways, essentially, your, one of your
13 primary tasks here is to compare what she would have made at
14 Dartmouth to what she would be making and did make at the
15 University of Vermont, correct?

16 A. Yes, that's the primary objective.

17 Q. Because you want to compare the difference between the two
18 so, if her pay at Dartmouth was higher than her pay at UVM she
19 may have sustained some damages from that, correct?

20 A. Yes.

21 Q. And she has a duty to mitigate her damages; you understand
22 that, correct?

23 A. I'm not a lawyer here, but that's my understanding, that
24 the plaintiff does have an obligation to mitigate.

25 Q. You know, in your 3,000 cases, all of them have dealt with

1 the issue that a plaintiff can't just let the damages
2 accumulate, they need to do what they can reasonably to make up
3 for those damages; is that correct?

4 A. Well, no. I've had cases where a person had a very unique
5 profession and it was unreasonable for them to pick up their
6 family and move cross-country to mitigate their losses.

7 Q. Okay.

8 A. And by that several, I've had several over the, over the
9 30 years that I've been doing employment cases where that
10 situation has arisen.

11 Q. Okay. But that's in contrast to the general rule where an
12 employee who is wrongfully terminated needs to attempt to gain
13 gainful employment, right?

14 A. It's my understanding, within reason.

15 Q. Yes. Now, you, at the time of the hearing we had last
16 week when I asked you some questions, you had issued a report
17 in August of 2024, as I discussed, that outlined the damages as
18 being \$4.3 million, correct?

19 A. As of, yes, 2033.

20 Q. Yeah. And one of the things I pointed out to you in the
21 report is that we at least had not received the 2004 pay
22 information from Dr. Porter. Do you remember that?

23 A. No, I don't.

24 Q. Do you remember that you testified under oath like you are
25 today that you had not used the 2004 (sic.) pay information in

1 calculating your August 2004 report?

2 A. Yeah, I did use the information that I had on her earnings
3 up, in 2004 up to about the time that I issued my report.

4 Q. But, when you came into court, you had not received her
5 W-2 from 2004; isn't that right?

6 A. It would be pretty hard to receive her W-2 for 2004 in
7 August of 2004. W-2s aren't generated until the end of the
8 year.

9 Q. Yes, but you, but you didn't obtain the 2004 and update
10 your report until I specifically pointed that out to you; isn't
11 that right?

12 A. No. I had received her W-2 after the 1st of the year. I
13 had that in my possession before I came to court last week, the
14 W-2.

15 Q. You had the 2024 W-2 in your possession before you came to
16 court last week?

17 A. Yes.

18 Q. Had you provided it to Ms. Porter, Dr. Porter's counsel?

19 A. I received it from Dr. Porter's counsel, I believe, or Dr.
20 Porter. I don't remember which one sent it to me.

21 Q. In your August 2024 analysis, you hadn't used the most
22 recent numbers; is that correct?

23 A. I used what she had for information up to this point in
24 time. I looked at what she had earned and what her earnings
25 were after July 1 and used that as a basis to forecast forward.

1 Q. Okay. And you also hadn't been made aware that, in July
2 of 2023, she became a full professor at the University of
3 Vermont; isn't that right?

4 A. I don't remember. I'm sure that I was told that, but I
5 don't remember that.

6 Q. Your testimony here today under oath is that you were told
7 that and you just don't remember that? Is that, is that what
8 your testimony is?

9 A. I believe I was -- I don't remember. I assume that I was
10 told. I had extensive, as the bill demonstrates, I had, the
11 reason that bill is so high is I spent an inordinate amount of
12 time on the phone with attorneys and with Dr. Porter. It's
13 hard to remember everything that was said and/or provided to me
14 in 2024.

15 Q. Your August 2024 report which was heading into a big
16 settlement conference with, at the hospital, by the way, showed
17 \$4.3 million, correct?

18 ATTORNEY VITT: Your Honor, objection. I don't think
19 there's any testimony about some big settlement conference.

20 THE COURT: Please approach.

21 (Bench conference begins.)

22 THE COURT: So what's your point here?

23 ATTORNEY VITT: I don't think -- I don't believe that
24 there's some big settlement conference. I mean, I'm not sure
25 what he's referring to.

1 ATTORNEY SCHROEDER: There was a mediation on
2 September 9th.

3 ATTORNEY VITT: Yes.

4 ATTORNEY SCHROEDER: Yes.

5 ATTORNEY VITT: Well, I wouldn't describe that as a
6 big settlement conference. I don't want to get into the
7 discussion of it, but I think we have a different view about
8 how things shook out. I mean, he certainly prepared a report
9 to try. You know, the case came back to the Second Circuit.
10 We tried to, you know --

11 THE COURT: Okay. You're going to --

12 ATTORNEY COFFIN: I'm not going to go into it, but it
13 is relevant, I think, for the reasons that we've outlined and
14 can explain those if necessary. I'm not going to go into it
15 much more, but it's not improper at all to ask that he made a
16 report really high before the settlement conference to try and
17 leverage this.

18 THE COURT: She's telling me she can hear you.

19 ATTORNEY COFFIN: I apologize. And try and leverage
20 a settlement and, after that, when he's got to put it on for
21 trial, he drops it down a lot.

22 THE COURT: I just want to be clear about the comment
23 you just made. Did you not hear that the law clerk could kind
24 of overhear? I want to be clear on the record. So, basically,
25 if Mr. Coffin going to be asking not much more on this topic

1 and certainly not getting into the substance of that, but,
2 basically the point is, in preparation for mediation, I think
3 the point he's trying to make is, Wouldn't you have gotten up
4 to speed on exactly what your report says?

5 ATTORNEY SCHROEDER: There's a court record that
6 reflects the fact that there was a mediation on September 9th
7 before John Schraven, because he charged moneys by both sides
8 to conduct that mediation here in Burlington, just for the
9 record.

10 THE COURT: Right. Just a little bit concerned about
11 getting into that --

12 ATTORNEY COFFIN: I don't need to get into it.

13 THE COURT: -- to any more degree. Frankly, even
14 another mention if this gave me pause because now the jury is
15 hearing that there was prior proceedings in the case that
16 didn't involve litigation. So I think it's something we should
17 be frankly steering clear of.

18 ATTORNEY COFFIN: I can steer clear.

19 THE COURT: While we're still here, with respect to
20 the other claim that was made, I think it was about the W-2,
21 you asked him questions about whether it was presented before
22 the hearing. Are you talking about the motion in limine
23 hearing?

24 ATTORNEY COFFIN: Yeah.

25 THE COURT: His first testimony on Friday in this

1 trial?

2 ATTORNEY COFFIN: I'm talking about the motion in
3 limine hearing. I needed to clarify that.

4 ATTORNEY SCHROEDER: March 14th?

5 THE COURT: March 14th. That's the W-2 that was then
6 disclosed to you?

7 ATTORNEY COFFIN: Yes, right.

8 (Bench conference ends.)

9 BY ATTORNEY COFFIN:

10 Q. Now, in your, in your practice calculating income and lost
11 income, you believe it's important to get the most accurate and
12 immediate payroll information, correct?

13 A. I agree, yes.

14 Q. Because how much money someone's making at the time is
15 important if you're going to compare a prior employer to a
16 current employer; isn't that right?

17 A. It's important to have, yeah, appropriate and current
18 information.

19 Q. A simple yes-or-no will suffice. I don't mean to cut you
20 off, but we're taking a long time.

21 And you did that when you obtained the information that
22 went into your report that I have on the screen before you now,
23 which is the March 19th 2025 report, correct?

24 A. I had what? What did I have?

25 Q. You obtained her most recent payroll information from 2024

1 when you prepared this report that's on the screen in front of
2 you from March 19th 2025, right?

3 A. Yes.

4 Q. And you did didn't choose to do that when you prepared
5 your 2024 report; isn't that right?

6 A. I beg your pardon.

7 Q. When you prepared your August 2024 report.

8 A. Yes. What did I do? What are you saying I did?

9 Q. Aren't I correct, Dr. Bancroft, that, when you prepared
10 your August 2024 report, you did not consider Dr. Porter's most
11 recent payroll information?

12 A. I considered her payroll information at the time I did the
13 report.

14 Q. From 2023, correct?

15 A. No, from 2024. I had information of what she'd earned up
16 through -- I don't -- I assume up through July. I don't know
17 exactly when I had it up to, but I had her earnings that she
18 earned in 2024 for a significant part of the year.

19 Q. Okay. And was that provided to you by counsel?

20 A. I don't remember if it was provided by counsel or directly
21 from Dr. Porter.

22 Q. Okay. You did not get the information that she'd actually
23 been elevated to full professor a year before that in July of
24 2023, though, did you?

25 A. I had --

1 Q. Yes or no, please.

2 A. Well, it's not -- I can't answer the question yes or no.
3 I'm sorry.

4 THE COURT: Dr. Bancroft, it is a yes-or-no question.
5 You're going to have to answer the question yes or no. Your
6 attorney will have an opportunity to ask you further questions

7 THE WITNESS: No.

8 BY ATTORNEY COFFIN:

9 Q. You didn't have that information --

10 A. Yes.

11 Q. -- correct? And am I correct that you did not have that
12 information?

13 A. I don't know. I don't know how to answer the question.

14 Q. Okay. In any event, your report in August 2024 did not
15 include any assumed 5 percent pay bump from becoming a
16 professor at UVM correct?

17 A. I used her current earnings at the time I issued the
18 report.

19 ATTORNEY COFFIN: And, Your Honor, please ask the
20 Witness to be responsive.

21 THE COURT: Answer the question, Dr. Bancroft.

22 THE WITNESS: No.

23 BY ATTORNEY COFFIN:

24 Q. Okay. And you did assume a 5 percent pay increase for her
25 professorship, which she never even got when she was at

1 Dartmouth, correct?

2 A. I did, yes.

3 Q. And changing those numbers matters because it is, again,
4 if she's making more at Dartmouth and less at UVM the
5 difference between the two is greater, correct?

6 A. Yes.

7 Q. And so you chose not to include that information on the
8 report in August of 2024 for UVM but you did for Dartmouth; is
9 that right?

10 A. No.

11 Q. Now, your report in March of 2025 does include some
12 increase in her salary while she's at University of Vermont
13 from your August 2024 report, doesn't it?

14 A. Yes.

15 Q. Now, the March 2025 report includes a number of new
16 assumptions. Well, you assume -- just put the chart up. You
17 assume that there are -- if you can turn that, please. You
18 assume that, for a couple of years, pay was stable at Dartmouth
19 due to, due to Covid; is that correct?

20 A. Yes.

21 Q. You assume that she received \$8,000 for one semester, a
22 little less than \$8,000 for one semester of tuition remission
23 for her son?

24 A. Yes.

25 Q. Okay. And that wasn't done in your prior report, correct?

1 A. No, it was not.

2 Q. And who pointed that out to you?

3 A. You did.

4 Q. Yes. And same thing with the Covid increases?

5 A. Yes.

6 Q. And how about the professor, did I point to that out to
7 you too?

8 A. I don't remember if you did or not.

9 Q. Oh, you don't remember me in court on March 14th telling
10 you that Dr. Porter had been, had become a professor and asking
11 you if you knew that?

12 A. I don't specifically remember that. I'm not saying it
13 didn't happen.

14 Q. Now, this report on the right-hand column, total economic
15 loss, uses a compound interest rate to account for the
16 expansion in dollar amounts due to inflation, basically; isn't
17 that correct?

18 A. I'm not sure I understand your question.

19 Q. The right-hand column, total economic loss, provides a
20 running total of losses that increases in part due to
21 compounding that value using an interest rate; isn't that
22 right?

23 A. Only on the historical.

24 Q. Okay. And the historical rate you chose to use was 12
25 percent; isn't that correct?

1 A. Yes.

2 Q. And there are other interest rates an economist could use,
3 correct?

4 A. Not in Vermont.

5 ATTORNEY COFFIN: Your Honor, I think we need to have
6 a quick approach on that.

7 THE COURT: Yes.

8 (Bench conference begins.)

9 THE COURT: Okay. So this obviously is going to lead
10 him to testifying something about Vermont law again. I think
11 that's the concern.

12 ATTORNEY COFFIN: Yeah, and, really, the witness
13 should have been instructed.

14 ATTORNEY VITT: Excuse me. I'm sorry. It's loud
15 enough that everybody can hear.

16 ATTORNEY COFFIN: I would have expected that the
17 witness, during a break, would have somehow been instructed
18 about the Court's rulings, but, regardless, he should not be
19 testifying with the tone, Vermont says this, and Vermont says
20 that. It's not his role. It's an implication that it's a
21 Vermont law thing, and we need to unwind that.

22 THE COURT: He was on the stand on cross-examination
23 when the break happened, right?

24 ATTORNEY COFFIN: Well, I still think he's -- I would
25 say there's a difference between discussing substantive

1 testimony and informing him about the Court's rulings about
2 guiding and limiting their testimony.

3 ATTORNEY VITT: I understand that the defendants want
4 to argue that there is some other rate that ought to be
5 applied. We will address that on substance. I think they're
6 dead wrong, but we're going to deal with that, and we're happy
7 to brief the issue, Judge. Dr. Bancroft understands that his
8 job is to determine in Vermont what's the amount that somebody
9 normally gets in terms of interest rates, and he says it's 12
10 percent. He's not saying necessarily it's the law, but is he
11 saying that's what he does on employment cases? Yeah. Every
12 case is 12 percent. That's what he does. He calculates 12
13 percent interest on back pay. I don't know how to avoid that.

14 THE COURT: He believes Vermont law requires it?

15 ATTORNEY COFFIN: Well, he shouldn't be testifying
16 law.

17 THE COURT: No, totally.

18 ATTORNEY COFFIN: And I would say this case has
19 federal law, Vermont law, and New Hampshire law, and it's an
20 open question. You know, Attorney Vitt and I may not see
21 eye-to-eye on what the ruling on it for, right ruling on it is
22 for the law that applies, but it is not what Dr. Bancroft says
23 it's going to be. That's not how it works.

24 ATTORNEY VITT: He was in the legislature for eight
25 years. He's got some familiarity with these issues. So I'm

1 not saying he's an expert, but --

2 THE COURT: I am going to have to instruct him about
3 not testifying as to what the law requires. I've already
4 stricken an answer from earlier saying that he testified that
5 he felt that's what Vermont law requires. So I may instruct
6 the witness to say, As you answer questions, answer Mr.
7 Coffin's questions on this topic, you shouldn't be speaking as
8 to your understanding of the law but just as to what your
9 analysis is.

10 ATTORNEY COFFIN: I think you need to remove the
11 geographic reference because that as well -- I would just say
12 to cure it, you know, he can't say -- he said, Well, that's
13 what it is in Vermont, like, implying there's some sort of
14 Vermont rule, and I think you need to be clear that, you know,
15 even just talking about law, because he might not understand
16 that, but and also strike the reference to Vermont or somehow
17 modify it. I don't have a verbatim suggestion for Your Honor,
18 but I think you get my import.

19 THE COURT: Mr. Vitt?

20 ATTORNEY VITT: I'm certainly fine with Dr. Bancroft
21 avoiding it, and you're right. I didn't talk to him on the
22 break. I didn't think it was my position to do that. Avoiding
23 saying, you know, this is what Vermont requires, but this is
24 what happens all the time in Vermont, that's fine. He does, as
25 a matter of practice when it's an employment case in Vermont,

1 use 12 percent. I happen to think he's right, but we'll get to
2 that another day.

3 THE COURT: I mean, on the other hand, it feels like
4 he has the right to testify how he makes use of this particular
5 rate, and it's a tough question to balance here. I don't think
6 he can provide a backbone opinion on it.

7 ATTORNEY COFFIN: He can say he used it because he
8 thought it was appropriate, but he can't say, Well, it's
9 because my understanding of law is such-and-such because it
10 just is too much of an open legal question, especially on this
11 record, and, you know, I'll just restate my concerns about, you
12 know, repeated admissions of discovery failures here, and it's
13 a little concerning.

14 THE COURT: Okay. So then I'm going to do my best to
15 -- he shouldn't be testifying as to what he thinks the law and
16 particularity the law in Vermont requires.

17 ATTORNEY COFFIN: Perfect. Okay.

18 ATTORNEY SCHROEDER: Will you strike the answer as
19 well? Because he said, In Vermont it is blank.

20 THE COURT: Right, yeah. I think I'll have to.

21 ATTORNEY SCHROEDER: Thank you.

22 (Bench conference ends.)

23 THE COURT: Okay. So the Court is going to strike
24 the previous answer to the extent that it references what the
25 State of Vermont, in the Witness's view, requires, and I'll

1 also direct the Witness not to, not to answer any of the
2 questions along this line involving your understanding of the
3 law or particularly what Vermont law requires.

4 THE WITNESS: Okay.

5 BY ATTORNEY COFFIN:

6 Q. All right. You said, Dr. Bancroft, that you used the 12
7 percent figure as an interest rate for accounting for inflation
8 on past damages in your total economic loss column; is that
9 right?

10 A. If I got to answer yes or no, no.

11 Q. Okay. Aren't I correct that you used the figure of 12
12 percent as an inflator as an adjustment in your total economic
13 loss column?

14 A. I used 12 percent interest, right.

15 Q. 12 percent interest, okay. Sorry about that. And so, if
16 you had used another interest rate such as 3 percent, wouldn't
17 the damages on past economic loss be about a quarter of what
18 you have opined here?

19 A. Well, I don't think they'd be a quarter, but they'd be
20 lower.

21 Q. A lot lower?

22 A. Um, no. I don't know if you want me to deal with a
23 particular year, try to give you an idea what.

24 Q. Well, yeah. So, like, each year your total economic loss,
25 you adjust the amount of the prior year's loss by 12 percent,

1 and my question to you is, If you adjusted it by a quarter of
2 that, say 3 percent, wouldn't the total economic loss be
3 essentially a quarter of your projection for a particular year?

4 A. No.

5 Q. No?

6 A. No. It's going to reduce the present value. It will
7 reduce the interest part, but the basic loss that is in Column
8 9 is going to stay the same. The interest, if you use 3
9 percent as opposed to 12 percent, the interest on that
10 component will be about a quarter.

11 Q. Okay.

12 A. But you've still got the base loss.

13 Q. Okay.

14 A. So you can't, you can't just go over to the further column
15 and say, If I use 3 percent, that number is going to be reduced
16 by 75 percent.

17 Q. Okay. So it wouldn't be a full reduction there, but,
18 basically, all of the accumulating interest in those losses
19 would be reduced by a quarter if you used 3 percent instead of
20 12 percent; is that right?

21 A. Yes.

22 Q. Okay. And you wouldn't describe that as a significant
23 difference?

24 A. Yes.

25 Q. You would describe it as a significant difference?

1 A. Yes.

2 Q. Okay. And so that would make, if the economic loss
3 figures were significantly different as a result of using 3
4 percent versus 12 as an inflator, basically, everything in your
5 chart is not correct; isn't that right?

6 A. Yes, because it has a cumulative total, and the present
7 value numbers out through 2024 would be smaller.

8 Q. Okay. And you described in Assumption 10 of the March
9 19th 2025 report which is C11, if you could go to the second
10 page of the assumptions, please. You described a discount rate
11 of 2.79 percent, five-year tax-free Triple A municipal bonds,
12 March 19th, is used to derive the present value for future
13 income, right?

14 A. Yes.

15 Q. And so that's an example of another interest rate one
16 could use based on those tax-free municipal bonds, right?

17 A. I guess you could use whatever interest rate you wanted
18 to.

19 Q. Now, your exercise on the fringe benefits attempted to
20 compare the value of her fringe benefits at Dartmouth to the
21 value of her fringe benefits at UVM; is that correct?

22 A. Yes.

23 Q. And, again, a lot of that was dependent on what she told
24 you, correct?

25 A. No.

1 Q. She didn't tell you, for example, that she got a fringe
2 benefit from the University of Vermont for tuition remission,
3 free tuition for her son; is that correct?

4 A. That part is true. I did not know that until you brought
5 it up.

6 Q. I told you that, right?

7 A. Yes, you did.

8 Q. And okay. And she continues to have the benefit of
9 tuition-free school for her kids going forward; isn't that
10 right?

11 A. I assume she does.

12 Q. And I'm not sure if she has any kids in school or not. Do
13 you know?

14 A. No, I don't.

15 Q. Okay. But you don't account for that specifically in your
16 report, right?

17 A. Well, it would be speculation.

18 Q. Now, can we please put up Page 34 of the Exhibit 5 of the
19 deposition testimony? Okay. And this should just go to the
20 witness, the judge. And do you recognize this document,
21 Dr. Bancroft?

22 A. I do.

23 Q. And is this a part of your work papers that was produced
24 in discovery?

25 A. I believe, yes, it was, and I had it in my initial file,

1 yes.

2 Q. And we talked a little bit about this at the hearing on
3 March 14th, didn't we?

4 A. I think we did. I don't know if we talked about this
5 specific piece of paper.

6 Q. Maybe this will refresh your memory. This document looks
7 like it's a page of something called "Pension Plan of Employees
8 of Dartmouth-Hitchcock". See that?

9 A. Yes.

10 Q. And you reviewed information about the pension in her
11 fringe benefits isn't that correct?

12 A. Yes, I did.

13 Q. Okay. And I think you testified that the amounts you put
14 in her fringe benefits were 12 percent of her pay; is that
15 correct?

16 A. Yes.

17 Q. And, and, really, not so much her past pay, but your
18 projections of her future pay; isn't that right?

19 A. Yeah, not her past pay, only on what she would, my
20 projections of what she would have earned at Dartmouth. The
21 contribution to a defined contribution is spent, laid right out
22 by the Dartmouth document as 12 percent.

23 Q. And my question is, So the, the, first of all, the total
24 pensionable pay that you see there, from your review of the
25 records, those look like her earnings at Dartmouth; is that

1 fair to say?

2 A. Well, that's what they're using to calculate with.

3 Q. Okay. Do you remember testifying that you thought those
4 were her earnings at the hearing last week?

5 A. I don't -- no. I don't remember seeing this.

6 Q. Okay.

7 A. This wasn't up there last week.

8 Q. And do you recall -- strike that.

9 Would her qualified pensionable pay, is that the amount of
10 her salary above which they no longer pay additional fringe
11 benefits to her retirement program, to your knowledge?

12 A. Run that by me again.

13 Q. Yeah. So the total pensionable pay on the column on this
14 document is larger than the qualified pensionable pay, isn't
15 it?

16 A. What numbers are you referring to?

17 ATTORNEY COFFIN: First of all, may I move this
18 document's admission? We're getting into it more than I
19 expected.

20 THE COURT: Okay. Any objection?

21 ATTORNEY VITT: I didn't hear the question. I'm
22 sorry.

23 THE COURT: Asking for the admission into evidence of
24 this document.

25 ATTORNEY VITT: Can we get a little more information

1 about where it came from?

2 ATTORNEY COFFIN: I believe the witness, the witness
3 testified it was part of his work papers. You produced it in
4 discovery.

5 ATTORNEY VITT: No objection.

6 THE COURT: And is this B21, Mr. Coffin?

7 ATTORNEY COFFIN: Yeah, let's call it that. Yes.

8 THE COURT: All right. Then Defendant's B21 is
9 admitted.

10 (Defense Exhibit B21 is admitted into evidence.)

11 BY ATTORNEY COFFIN:

12 Q. Okay. So qualified pensionable pay is lower throughout
13 the total than total pensionable pay; do you see that?

14 A. No, I don't see that it's lower. Oh, yeah, I do see that.
15 There's two columns here. Yes. There's different calculations
16 for this. The column over on the right-hand side is by law.
17 Law specifies the maximum amount of income that you can
18 calculate a pension on.

19 Q. Okay. And so, if you make more than that, it doesn't
20 calculate in your pension; is that what you're saying?

21 A. That's correct.

22 ATTORNEY COFFIN: Okay. And so -- oh, yeah, yeah.
23 Yes. Can we publish this to the jury? Thank you?

24 THE COURT: Yes.

25 BY ATTORNEY COFFIN:

1 Q. Sorry. So here we see total pensionable pay, qualified
2 pensionable pay years 2008 to 2017, right?

3 A. Yes.

4 Q. Okay. And so, if, and you note that throughout here
5 qualified pensionable pay is lower than total pensionable pay,
6 correct?

7 A. Yes. There's a formula for calculating that. You can see
8 at the bottom of the, at the bottom of the original document
9 you had up there.

10 Q. Okay. And on the right there's sort of a cap that occurs
11 above which you don't get your income to count towards your
12 increased pension; is that right?

13 A. Yes.

14 Q. Okay. And so, when you calculated her fringe benefits
15 going forward, you calculated them to be 12 percent of her
16 total pay; isn't that right?

17 A. Yes, because that is what the defined contribution, not,
18 not the defined benefit package. This right here is the
19 defined benefit package that ended at December 31st of 2017.
20 Going forward, it's a defined benefit package, which there's a
21 document that was in my folder back in my deposition that laid
22 it right out. It was published. It was a colored folder that
23 laid out that Dr. Porter was eligible, not eligible, would
24 receive contributions to a 403(b) equivalent to 12 percent of
25 her actual earnings.

1 Q. Actual earnings, not qualified pensionable pay?

2 A. Not qualified pensionable pay, because this is under a
3 different, whole different law. It's a defined benefit
4 package.

5 Q. Okay. And still you have made the assumption in assessing
6 what her fringe benefits would be that they'd be 12 percent of
7 the, of your estimated pay that she would receive from
8 Dartmouth?

9 A. I'm using --

10 Q. Yes or no?

11 A. Yes.

12 Q. Okay. And so, to the extent that she would not receive
13 2.5 percent increases every year, that may result in a lower
14 salary from Dartmouth and mean your 12 percent figure is
15 exaggerated; isn't that right?

16 A. Well, it would lower the fringe benefits, yes, but it
17 would still be 12 percent of whatever the number is in that
18 first column.

19 Q. But it's of whatever the number is, not necessarily your
20 projections, correct?

21 A. It's 12 percent times the number, the income projection.

22 Q. Now, you don't calculate -- you can take that down. You
23 don't calculate -- well, actually, put it back up really
24 quickly. Sorry. Just real quick, one more question on this,
25 maybe two.

1 The earnings in this column do not go up uniformly 2.5
2 percent each year; isn't that correct?

3 A. As I said before --

4 Q. Yes or no, isn't that correct?

5 A. They do not. They, pensionable income does not go up by
6 law. It goes up by a set amount that's specified each year by
7 law, not by what Dartmouth wants to do.

8 Q. Let's go to -- you can take that down, please. Do you
9 know whether Dr. Porter qualifies for a pension from UVM
10 Medical Center or UVM Medical College, also known as the
11 College of Medicine or the Larner College of Medicine?

12 A. Yeah, there's a 403(b) plan at UVM of which UVM
13 contributes 9 percent of her salary into it so she will have a,
14 when she retires, she can draw on that fund just as if she
15 could if she continued working at Dartmouth. She could draw on
16 that fund that they contributed 12 percent to.

17 Q. Do you know whether she would qualify for a pension as a
18 professor of OB/GYN at the University of Vermont?

19 A. No. There's no such thing. I don't know what your
20 definition of pension is. If your definition -- I believe, if
21 I remember correctly -- it may have been last week -- the
22 pension you associated with the defined benefit package where
23 there's a formula to determine it. That's not the case at UVM
24 nor is it the case at Dartmouth now.

25 Q. Okay. Not talking about Dartmouth now. I'm asking about

1 UVM

2 A. Well, it's the same thing. There's a 403(b) plan of which
3 money is put in. UVM puts money into that plan, and that's her
4 money and she can start withdrawing that at -- I forget
5 exactly. I think there's some qualification where you might be
6 able to draw it before 65, but that's her money, and she can
7 decide how she wants to withdraw it.

8 Q. And how much is her yearly benefit from that?

9 A. It's whatever she wants to withdraw. There will be, there
10 are rules and regulations. There's a required minimum
11 withdrawal specified by law, but you can take the minimum, and
12 you don't have to start taking that until 73, or you can take
13 more, but it's entirely up to the individual how they want to
14 receive that money.

15 Q. Can you put up 34, please? And just for the judge, the
16 witness, and the -- page, oh, I'm -- 35, 35 is what I wanted.
17 Sorry. Looking at this document, does that refresh your
18 recollection about what the withdrawal would be for certain
19 years?

20 A. On, yes, on her old plan.

21 Q. Yes.

22 A. The one that they, they eliminated as of January 1 2018.

23 Q. Right. And what does that say?

24 A. It says --

25 ATTORNEY COFFIN: Can we move the admission, please?

1 THE COURT: Any objection?

2 ATTORNEY VITT: No objection.

3 THE COURT: All right. And what is -- hold on,
4 Dr. Bancroft. What is the number on this exhibit?

5 ATTORNEY McDONALD: This is a different page from the
6 same exhibit.

7 THE COURT: So C?

8 ATTORNEY McDONALD: B21.

9 THE COURT: Oh, so this has already been admitted?

10 ATTORNEY COFFIN: I think that's next page of the
11 same exhibit, and only those two pages should be admitted. We
12 can clear that up at a break, Your Honor.

13 THE COURT: Okay. So then C21 is admitted, this
14 page.

15 ATTORNEY McDONALD: B21, Your Honor.

16 ATTORNEY COFFIN: I apologize, Your Honor. It's B21.

17 ATTORNEY McDONALD: B, as in boy, 21.

18 THE COURT: Okay, thank you. B21 is admitted.

19 BY ATTORNEY COFFIN:

20 Q. Dr. Porter, does that say that -- excuse me, Dr. Bancroft,
21 does this say that Dr. Porter gets a pension from Dartmouth
22 still? Even though she's separated from them, she's eligible
23 for a pension where she could get a single life annuity worth
24 \$9,431?

25 A. Yes, she's entitled to that for the work that she did up

1 to '17.

2 Q. Okay. And so she's entitled to that, and she could be
3 getting that even now, correct?

4 A. Well, there is a, there's penalties if she was to take it
5 before 65. They're quite severe.

6 Q. And no penalties at 65?

7 A. No penalties at 65.

8 Q. Your chart doesn't show that addition to her income, does
9 it?

10 A. No. Don't need to. I'm only interested in that, in
11 estimating what the loss is. I'm not going to -- I don't need
12 to put down on the chart what she earned in the past --

13 Q. Okay.

14 A. -- both as income and as benefits. This program is done.
15 She's going to receive, depending on how they she ticks it, if
16 she ticks a single life annuity, she's going to get \$9,400, but
17 the issue is, How much more would she get from a 403(b) if she
18 continued to work at Dartmouth?

19 Q. Now you can take that down and put up the chart from March
20 19th 2025, please. Now, this chart goes to the out years of
21 2033; isn't that right?

22 A. Yes.

23 Q. And you testified at the beginning that you're not
24 projecting that she'll work until age 70; is that correct?

25 A. Yes, correct.

1 Q. And, however, you have underlined the amounts at age 70;
2 isn't that right?

3 A. Yes.

4 Q. And it says in a little note at the bottom, "The year
5 2033", underlined, "is consistent with the work life of a
6 62-year-old female with a graduate degree"; is that correct?

7 A. Yes.

8 Q. And that's the basis for your emphasis of that; is that
9 correct?

10 A. Yes, yes.

11 Q. But you're not estimating that she would work this long;
12 is that correct?

13 A. No, I'm not. I put that in there to help the jury. It's
14 some additional information.

15 Q. Because you have breakdowns for each year. So at 65, for
16 instance, it's the, the total economic loss would be 1.360,
17 correct?

18 A. Yes.

19 Q. You know, not accounting for the higher compound interest
20 rate than I've suggested you might be appropriate; isn't that
21 right?

22 A. Repeat that last part.

23 Q. Yeah. It's 1.3 million, but that doesn't take any amount
24 you might reduce if you used an interest rate of, say, 3
25 percent versus 12 percent?

1 A. No, it takes -- that represents a 12 percent on historical
2 losses.

3 Q. Right. And, if you used a lower rate, you'd have a lower
4 number?

5 A. Yes.

6 Q. And, looking at this, you have the gross earned income
7 from Dartmouth in Column 1 and the gross earned income from UVM
8 in Column 4; is that correct?

9 A. Yes.

10 Q. And looking at between '24 and '25, the gross income from
11 Dartmouth or, excuse me, from UVM drops from \$313,000 to
12 \$302,000; isn't that correct?

13 A. Yes.

14 Q. And that is to reflect, is it not, the change in her work
15 from full-time, 1.0, to .75; isn't that correct?

16 A. No.

17 Q. No, it's not?

18 A. No.

19 Q. Why does it go down after that?

20 A. She's moving from a .8 part-time position. She is not
21 working full time. She works .8, and she's moving down to a
22 .75.

23 Q. I see. I see. And so the salary numbers that you used in
24 there reflecting a .8 position, not a full-time position; is
25 that correct?

1 A. Her --

2 Q. Yeah, the numbers you put in there -- strike that.

3 For 2017 to '24, the numbers you put in there are assuming
4 a .8 position?

5 A. Well, from 2017 to 2024, the numbers in that gross earned
6 income column under the UVM are her actual earnings. I'm not
7 doing any forecasting. Those are her actual earnings out
8 through the year 2024. Projections start in 2025.

9 Q. Okay. And actual being a 1.0 position?

10 A. No, I don't think she was 1.0. It's, I don't know if she
11 ever had a 1.0. I know recently it's .8. But what I'm
12 concerned about, well, not concerned -- the important thing is
13 I need to put in what she actually earned.

14 Q. Yes.

15 A. And I did.

16 Q. But you do more than that, because you project going
17 forward earnings at what you calculated would be a .75 position
18 at UVM isn't that right?

19 A. Yes. I went forward forecasting. Starting at 2025, I'm
20 starting to forecast, project out what her earnings, what I
21 believe her earnings would be, and I, that's based on starting
22 July 1 on a .75 part-time appointment.

23 Q. Okay, okay. Got you. Just a second, please. Did you --
24 you must have come up with this number by reducing to .75 from
25 what you, her, her projection was for her; isn't that right?

1 A. Yes.

2 Q. Okay. So you'd done that math before, correct?

3 A. I'm not sure what quite what your question is, but, if
4 you're talking about 2025 --

5 Q. Yeah.

6 A. As I explained on direct, two-step process. The first
7 thing I did was increase her 2024 income by 2.5 percent, and
8 then, starting on July 1, I reduced it by a little over 6
9 percent, reflecting her moving from a .8 to a .75 position.

10 Q. Okay. So what I would like to do is just have you do a
11 little math with me, please. Take the numbers of her total
12 earnings from -- I'll give you a pad you can write on in a
13 second.

14 ATTORNEY VITT: I'm having a hard time hearing. I'm
15 sorry.

16 BY ATTORNEY COFFIN:

17 Q. I apologize. Doing the math, from 2005 to 2027 and
18 looking at gross earned income, I'm going to have you divide
19 that by .75, which would give you the figure for a 1.0
20 position.

21 THE COURT: So, Mr. Coffin, I'll ask you to pull the
22 microphone a little closer to you. People are having a
23 difficulty hearing you.

24 ATTORNEY COFFIN: I apologize. Do I need to repeat
25 that?

1 ATTORNEY VITT: We couldn't hear it. I'm sorry.

2 ATTORNEY COFFIN: Yeah, I apologize. I'll try and
3 project.

4 THE COURT: If you want to discuss it with the
5 Witness at the stand, you might be able to take his microphone.

6 BY ATTORNEY COFFIN:

7 Q. Share? Do you mind if I share? Thank you. Okay.
8 Dr. Bancroft, I'm showing you the -- you have before you the
9 March 19th 2025 chart, and I'd like you, with the calculator,
10 and I'm going to get you a pad so you can write it down in a
11 second, to calculate what the gross earned income for a .75
12 position you have in there is for a 1.0. So you divide 302 by
13 .75 for that, for year 2025. And I'll be back in a second.
14 You can use my calculator. Let me just get a pad and --

15 A. Well, may I comment? The 2025 figure includes six months
16 at .8 and six months at .7. So calculation is not as simple as
17 dividing it by .75. Now, when I get to year 2026 and forward,
18 I can divide that by .75 to see what a full-time position is.

19 Q. Just for rough, rough cutting here, can you please do what
20 I asked you to do and divide the \$302,000 that is on your chart
21 for her total earnings at UVM for 2024 by .75, which would give
22 you what 1.0 is for that figure?

23 A. No, it will not.

24 Q. Well, can you just do it and --

25 A. I'll do it anyways, but it's not correct.

1 (The Witness uses the calculator.)

2 Q. That's \$403,000?

3 A. Yes.

4 Q. I'll go put a star by that so because you've raised some
5 points about how you calculated that. Do the same thing for
6 2006 and 2027. I'll let you write it.

7 (Witness complies.)

8 A. I'll let you write it.

9 Q. What is it?

10 A. \$427,888.

11 Q. \$427,888? That's a 1.0 position for 2026 at University of
12 Vermont Medical Center --

13 A. Yes.

14 Q. -- correct? 2027, please.

15 A. That was 2027.

16 Q. Can you do 2026 then?

17 A. Oh, I'm sorry.

18 Q. That was 2027? You're sure?

19 A. No, I'm not. Hold on just a second.

20 Q. Sure.

21 A. That number I gave was for '27.

22 Q. Okay. \$427,888 for 2027; is that right?

23 A. Yes. And '26 --

24 Q. What's 2026?

25 A. \$415,425.

1 Q. Okay, thank you. I'll take my phone. So you calculated a
2 full-time position for 2025 with a couple of notes that, you
3 know, you had differing methodologies for the first half of the
4 year, second half of the year, but the .75 to 1 conversion was
5 \$403,000, approximately, right?

6 A. I'll take your word for it. I don't have in front of me.

7 Q. 2026, the calculation of a full-time position, and, again,
8 here looking at the chart -- what is this exhibit number, by
9 the way? C11, looking at this chart that's C11 and going down
10 to 2026, the amount you have written there for a gross income
11 from Dartmouth at or from UVM you have at a .75 position. If
12 that was a full-time position, 1.0, the amount you calculated
13 would be \$415,925; isn't that correct?

14 A. I don't know. I'll take your word for it.

15 Q. Okay. And 2027, the calculation if you converted the .75
16 gross figure from \$320,000 to 1.0 would be \$427,888, correct?

17 A. Take your word for it.

18 Q. Okay. So I note that all three of those years her
19 earnings at Dartmouth if she was a 1.0 employee, a full-time
20 employee, would be higher, excuse me, at UVM would be higher
21 than what it was at Dartmouth; isn't that right?

22 A. Higher than what I'm projecting, yes.

23 Q. Okay. And so, by that time, she would have fully
24 mitigated her losses and, going forward, luckily for her, she's
25 going to be making more at the University of Vermont than she

1 is at Dartmouth?

2 ATTORNEY VITT: Objection. It's speculation, Judge.

3 THE COURT: Overruled.

4 ATTORNEY COFFIN: Can you read the question back,
5 please?

6 (Question read by the reporter.)

7 THE WITNESS: She would be making more at UVM based
8 on a full-time position than my projections at Dartmouth.

9 BY ATTORNEY COFFIN:

10 Q. Okay. Now, thank you. Now I'd like you to make another
11 --

12 THE COURT: I'm sorry, Mr. Coffin Dr. Bancroft, can
13 you please pull the microphone closer?

14 THE WITNESS: Sorry.

15 ATTORNEY COFFIN: And I think we'll be done with
16 cross soon if that's okay, Your Honor. I don't have a lot more
17 to do.

18 THE COURT: All right. Go ahead.

19 BY ATTORNEY COFFIN:

20 Q. Now, more math, but you're a math guy. You're an
21 economist. 36 weeks is 9 months, approximately?

22 A. What's that?

23 Q. 36 weeks equals 9 months, approximately?

24 A. Yeah.

25 Q. Yeah. Four weeks in a month, right?

1 A. A little over, yes.

2 Q. And nine months is about three-quarters of a year?

3 A. Yes.

4 Q. Okay. Now, you estimated that, at Dartmouth, when she
5 left Dartmouth, she would have been making a gross income of
6 \$309,000 in 2018; is that right?

7 A. That's my estimate.

8 Q. Okay.

9 A. I don't know because I have to estimate it.

10 Q. Okay. And so you might be able to do this in your head,
11 but we'll do with it with the calculator. .75 times \$309,000
12 is what?

13 A. I don't know. You have the calculator. What am I
14 supposed to do here?

15 Q. .75 times \$309,000, your 2018 projection.

16 A. 319,000? \$232,019.

17 Q. Okay. So in 2018 if she had received three-quarters' pay
18 for the year, that means that that would be, like, \$232,000; is
19 that right?

20 A. Well, that's the -- the math works out that way.

21 Q. Right, right. Fair enough. And you never heard -- well,
22 strike that.

23 Wouldn't all of your assumption be thrown radically off
24 course if she had received \$228,000 in the second half 2017 and
25 had been able to keep working at UVM?

1 A. Run that by me again.

2 Q. Yeah. Assume, please, that in 2017 -- strike that.

3 In the second half of 2017 and into early 2018, she had
4 received \$228,000, just gift, but had been able to pursue her
5 now current employment which started then at University of
6 Vermont Medical Center. Assume that. How, wouldn't that mean
7 that your calculations here are completely thrown out the
8 window?

9 A. Well, if you're going to assume less Dartmouth earnings,
10 obviously, my numbers are going to be off because my numbers
11 are predicated on my projections of what she would have earned
12 at Dartmouth, and so, if you change those numbers, it's going
13 to change the total economic loss.

14 Q. Correct. And you base a lot of your projections both for
15 Dartmouth and UVM on what she told you, correct?

16 A. Yes.

17 Q. And what Counsel Vitt told you, correct?

18 A. Yes, I mean, but, but most of the times I talked with
19 counsel, Dr. Porter was on the line.

20 Q. Okay. No one mentioned to you, I presume, that anything
21 well -- strike that.

22 Can you please show what's been admitted as C6A? And I'm
23 publishing this to the jury, Your Honor.

24 THE COURT: Okay. It's published.

25 ATTORNEY COFFIN: And now please publish C13. Blow

1 up that paragraph on severance pay.

2 ATTORNEY VITT: May we approach the bench, Judge?

3 THE COURT: Yes.

4 (Bench conference begins.)

5 ATTORNEY VITT: I think what they're doing is taking
6 the severance offer if she had agreed to waive her rights and
7 accept the money. They can't take the severance offer and say,
8 Well, you should have taken that and, therefore, the payment
9 would have been greater. That is -- I just figured out what
10 they're doing here.

11 ATTORNEY COFFIN: Well, I'm asking this economic
12 expert to describe another "what if", which is, What if she had
13 taken the severance offer, which has been admitted into the
14 evidence without objection, and say whether he could project
15 how that would affect her future earnings. And, of course, it
16 would affect them greatly because he doesn't, it appears he
17 doesn't know about that because he's relying on selective
18 information from the plaintiff, which is all impeachment. It
19 goes to his credibility, and it goes to the substance of what's
20 going on here.

21 ATTORNEY VITT: She has no obligation to accept a
22 severance offer that asks her to give up her various rights.
23 She had no obligation. You can't say, Well, we made a decent
24 offer; you had to give up your rights, you know,
25 confidentiality. I mean, you know, there's settlement offers,

1 I've seen these before. Basically, you know, you have to be
2 quiet. You can't disclose the amount. You can't talk, you
3 know, nondefamation clause in there. Absolutely not. You
4 don't get to say, Here's a settlement offer, and, oh, by the
5 way, when it comes time for damages, we're going to consider
6 that and you should have accepted it, and this somehow affects
7 your damages.

8 ATTORNEY COFFIN: So we have been asked to deal with,
9 on the fly, repeated last-second reports, nondisclosure,
10 varying economic opinions, and that's all supposed to be good
11 for us, and we're supposed to deal with it, but the remedy for
12 that, of course, is cross-examination on these documents, and,
13 if this information has been already submitted without
14 objection, it's relevant, already found, already admitted to
15 the case for any purposes, no limiting purposes. I think it's
16 a fair point.

17 THE COURT: It's in evidence. So, Mr. Vitt, it would
18 be very difficult for me to limit cross-examination on this
19 when it's before the jury already and has been since last week.
20 You'll obviously have an opportunity to speak to your witness
21 again on redirect and examine him on this.

22 ATTORNEY VITT: All right. Thank you.

23 (Bench conference ends.)

24

25 BY ATTORNEY COFFIN:

1 Q. Now, Dr. Bancroft, you saw, as we published to the jury,
2 the last two exhibits which are -- find I piece of paper here
3 -- C6A and C13, correct?

4 A. Yeah, I believe so. I'm seeing C13.

5 Q. Yes or no, you see them?

6 A. I see 13.

7 Q. Before you were just shown C6A.

8 A. I'll take your word for it.

9 Q. Would you like to see it again?

10 A. If you want me to, absolutely, sure, yes.

11 Q. Could you put up C6A, please? And, directing your
12 attention to that first paragraph -- the rest is on another
13 issue -- you've read that now?

14 A. Yes.

15 Q. And look at, please -- we're going to put C13 up again.
16 And, directing your attention to the highlighted paragraph,
17 which there it is, this paragraph describes that they're
18 willing to give a severance to 36 weeks, see that?

19 A. Yes.

20 Q. Did Dr. Porter or Attorney Vitt discuss anything about the
21 payment of \$228,000 in 2017 to Ms. Porter, Dr. Porter, excuse
22 me, with you prior to your testifying here today?

23 A. I don't remember if they specifically talked about it, but
24 what I looked at is what she actually earned, and if you'll
25 notice in 2017 I'm saying her loss is, what, \$600.

1 Q. Yes-or-no questions are really important here, not side
2 tours, please. You cannot testify that they provided this
3 information that she was offered a \$228,000 severance in 2017
4 today, correct, yes or no?

5 A. I don't see that number, so I don't know what she was
6 offered.

7 Q. Excuse me. Yes or no, please?

8 ATTORNEY COFFIN: Can you read me my question back,
9 please?

10 (Question read by the reporter.)

11 A. I don't remember.

12 Q. If they had described a 228-some-odd-thousand-dollar
13 payment that would be made then, would that have affected your
14 economic analysis?

15 A. No.

16 Q. Okay. And so, if Dr. Porter had received -- can you put
17 up the 2025 chart, please? If Dr. Porter had received a
18 \$228,000 payment in 2017, your gross earnings figure for that,
19 assuming it was earnings, your gross earnings figure for that
20 year would have gone up by \$228,000; isn't that right?

21 A. Well, if you were to add those two together, it would, but
22 I looked at what she actually received.

23 Q. I understand what you did. I'm just asking you a
24 hypothetical.

25 A. If it's a hypothetical, yes, it's a hypothetical.

1 Q. Okay. And so that increased earnings capacity or that
2 lump sum earnings --

3 ATTORNEY VITT: Objection, Your Honor.

4 ATTORNEY COFFIN: Would have --

5 ATTORNEY VITT: Accepting a severance payment to give
6 up your claims is not --

7 THE COURT: Well, Mr. Vitt, instead of a speaking
8 objection, I'd ask you to come up.

9 (Bench conference begins.)

10 THE COURT: I understand your point. I think what
11 you're asking to say is accepting a severance --

12 ATTORNEY VITT: Is not an increased earnings
13 capacity.

14 THE COURT: He's asking him this as a hypothetical,
15 if she had accepted the severance pay, right? Why can't you
16 come back on redirect and reestablish what he's saying now,
17 which is that she --

18 ATTORNEY VITT: Severance, but it's not, it doesn't
19 increase her earnings capacity. That's what that increases
20 earnings capacity. No, it doesn't. She's simply accepting a
21 severance, giving up rights that she otherwise has. That
22 doesn't increase her earning capacity.

23 THE COURT: I don't know that your questioning is to
24 make the point that it increases earning capacity.

25 ATTORNEY COFFIN: No, it's not.

1 THE COURT: It would have been in red of that
2 particular amount.

3 ATTORNEY COFFIN: Yes, and he should and she would
4 have had less to mitigate, and she would have been able to
5 mitigate earlier, though it's crazy how quickly she did
6 mitigate.

7 ATTORNEY VITT: There wouldn't have been a lawsuit.

8 ATTORNEY COFFIN: It might have been in her interest
9 to take that, but, yes, it's a legitimate cross.

10 THE COURT: As I said before, you can come back on
11 redirect, and he'll make that point for you. It sounds like
12 she didn't accept it and his basis of calculation is what she
13 actually received.

14 ATTORNEY COFFIN: This is probably the one or two, if
15 I can spit them out, and then we're done.

16 ATTORNEY VITT: Take a break and then --

17 THE COURT: Yes.

18 (Bench conference ends.)

19 BY ATTORNEY COFFIN:

20 Q. Dr. Bancroft, if Dr. Porter had received a payment of
21 \$280,000 as earnings in 2017, that would have increased her
22 earnings column in Column 1, Line 1 on 2017 by some \$228,000;
23 isn't that correct?

24 A. I'm not sure of that. I can't answer yes or no. I don't
25 know. I'd have to see the circumstances what she got. I told

1 you the measure I have there is actual earnings.

2 Q. Okay. I'm asking for a hypothetical.

3 A. Okay.

4 Q. Okay. So please answer my question.

5 A. Make it clearer to me that it's a hypothetical.

6 Q. Okay, I'll try. If she, if, if, hypothetically, she had
7 received \$228,000 in earnings in 2017 and that would be in
8 something using the methodology you've talked about here, you
9 would add it to her gross earned income, right?

10 A. No. Maybe. I don't know. I can't answer. I don't know,
11 no.

12 Q. You can't say that, if it's earnings and she had it, you'd
13 consider it?

14 A. I put in her actual earnings.

15 Q. Well, let's assume she actually earned that, she got,
16 actually got a \$228,000 payment in 2017, she actually got that
17 as reflected by the letter offering her that, for example,
18 right? Then you would have that added to the gross earned
19 income column, correct?

20 A. If it's not already taken into account.

21 Q. Okay. And from there that flow-down would be moneys that
22 she could use to offset other deficiencies in her earnings
23 later on, correct?

24 A. Yes. So you're assuming that she would have, she would
25 have left Dartmouth?

1 Q. Let's assume what happened happened, she left and she went
2 to UVM

3 A. Yeah, I'm just trying to understand your hypothetical.

4 Q. Okay. Apologize. And she's working away at Dartmouth for
5 a while, but she leaves and is offered a position, you know,
6 pretty much right way at UVM and she works there and has a
7 successful career there, correct?

8 A. Yes.

9 Q. But maybe in the first couple of years it's a little bit
10 less than what she was making at Dartmouth, correct?

11 A. Quite a bit.

12 Q. Okay. But \$228,000 could do quite a lot to fill up that
13 divot; isn't that correct?

14 A. If this is some new money that she would have received,
15 yes.

16 ATTORNEY COFFIN: Okay. Those are all I got, Your
17 Honor.

18 THE COURT: Okay, all right. So we'll take our lunch
19 break. We'll be ready to go at 1:30, please.

20 (A recess was taken from 12:26 p.m. to 1:32 p.m.)

21 THE COURT: Okay. Mr. Coffin

22 ATTORNEY COFFIN: On very minor matter, Your Honor.

23 THE COURT: Yes.

24 ATTORNEY COFFIN: In the rush to get jury and all of
25 us to lunch, I wanted to move the admission of what I'm calling

1 C19, which is the little handwritten chart that Dr. Bancroft
2 prepared during his cross. I propose that this be admitted at
3 this time as demonstrative evidence and that we likely will
4 follow with asking for it be substantive evidence should the
5 plaintiff's chart be admitted as substantive evidence.

6 THE COURT: Is there any objection, Mr. Vitt?

7 ATTORNEY VITT: Well, we certainly object to it being
8 admitted into evidence under any circumstances. Dr. Bancroft
9 said it was inaccurate. So, to the extent it's been used
10 demonstrably, fine, but I don't know about admitting as
11 demonstrative. I don't know what that means.

12 THE COURT: So a demonstrative would be that,
13 obviously, he did some calculations on cross-examination. It
14 could be shown to the jury for, for whatever purpose the
15 defense has asked him to do those calculations. If it's
16 admitted as a demonstrative now, then on redirect, if you
17 choose, you can make use of that as well to speak to
18 Dr. Bancroft about that.

19 ATTORNEY VITT: I don't intend to use it at all.

20 THE COURT: Okay. Do you object to it?

21 ATTORNEY VITT: I do.

22 THE COURT: Okay. Can I actually see it? I haven't

23 --

24 ATTORNEY COFFIN: If I might approach, Your Honor.

25 THE COURT: Yes of course. This is

1 ATTORNEY COFFIN: This is the only copy in the world.

2 THE COURT: So it says very little, but I know it's
3 because your questions were kind of prompting. So this is the
4 ultimate sum total on the cell phone of the calculations you
5 directed him to make?

6 ATTORNEY COFFIN: Yes. These were the calculations
7 that were made using the addition based on the cell phone
8 calculator and written in.

9 THE COURT: Okay. And, if this were to be admitted
10 as a demonstrative now, Mr. Vitt objects to that, but he is
11 also not going to be making any use of it. Is there any reason
12 why we can't take this up at a later time?

13 ATTORNEY COFFIN: No. I just didn't want him to be
14 deprived of it on redirect. We just created it, and I wanted
15 him to be aware of it.

16 THE COURT: Given that he's not going to use it, I
17 guess I won't rule on this right now, but let's not forget it.

18 ATTORNEY COFFIN: Okay. I do view this as important
19 cross-examination admissions of this witness, by the way.

20 THE COURT: Okay. But, again, Mr. Vitt, you have no
21 intentions of using this on redirect?

22 ATTORNEY VITT: None.

23 ATTORNEY SCHROEDER: Judge, I also asked Emerson if
24 we could come in a little bit early, just to go over, knowing
25 that we have a lineup for tomorrow. I've spoken with

1 Dr. DeMars about, Hey, I don't think the other side is going to
2 be done with you today. Can you figure out how to come back
3 tomorrow? She's making arrangements to do that.

4 But then we have Dr. Conroy, CEO, coming, and it's really
5 important to get her on and off since Dr. DeMars is sitting out
6 there for the whole day since 9:00 a.m. without her phone. So
7 she doesn't have the ability to get any work done. The same is
8 going to be true for Dr. Conroy. I know of they have a few
9 other witnesses that may or may not have some other issues,
10 Dr. DeMars was here for today. We're making arrangements to
11 have her back tomorrow morning. But, given the fact that they
12 don't have the ability to sit out there and do work while
13 they're here, it is really important for us that Dr. Conroy
14 then gets on right after and gets off quickly. Because I don't
15 think that's going to take more than 15 minutes.

16 THE COURT: Okay. And Dr. Conroy is for tomorrow?

17 ATTORNEY SCHROEDER: Correct.

18 ATTORNEY NUNAN: Well, okay. So we had given
19 Michelle Russell a subpoena for 9:00 o'clock tomorrow, which we
20 understand she would go on after Dr. DeMars, and we had been
21 accommodating to allow Dr. Conroy to come on Tuesday instead of
22 Wednesday. So, again, I do not think that Dr. Russell will
23 take long, but she does have childcare duties at the end of the
24 day in the Upper Valley, and I am going to try to get her on,
25 like I told her, as soon as possible in the morning. And she

1 also will be without her phone and not able to work in the
2 lobby.

3 THE COURT: Okay. So Dr. DeMars, after the remaining
4 redirect today, possibly coming back in the morning if
5 necessary. Plaintiff then intended to call Dr. Russell after
6 that and then Dr. Conroy, right?

7 ATTORNEY NUNAN: Right.

8 ATTORNEY SCHROEDER: Yes.

9 THE COURT: Dr. Conroy after that. So thank you for
10 letting me know. Let's see how the day goes, see what we get
11 through, and I'll be asking the same questions at the end of
12 the day. Anything else?

13 ATTORNEY McDONALD: One minor exhibit issue. I think
14 the Court admitted the entirety of B21. I've spoken with
15 opposing counsel, and I think the intention was just that two
16 pages from that larger set be admitted. So they have agreed
17 that B21A should be Page 34 from B21 and B21B should be Page 35
18 from the original B21 but that the entirety of B21 not be
19 admitted.

20 THE COURT: Okay. Mr. Vitt, is that accurate?

21 ATTORNEY VITT: Yes. Thank you, Your Honor.

22 THE COURT: Okay. So then B21A and B21B are
23 admitted, B21A being Page 34 and B21B being Page 35.

24 ATTORNEY McDONALD: Thank you, Your Honor.

25 THE COURT: Okay. The bench conferences, I have to

1 tell you. It's, it's a little cacophonous up here.

2 ATTORNEY COFFIN: I apologize, Your Honor.

3 THE COURT: Yeah, I know we have to be very much on
4 top of this. If people are not going to keep the volume down,
5 I'm just going to have to ask the jury to leave every time we
6 have a bench conference. I honestly don't know what else I can
7 do in that circumstance. Please be mindful of it. I certainly
8 have noticed -- how could you not notice it -- that there does
9 seem to be a fair amount of tension here between the lawyers.
10 I know you're both advocates for your position, but it
11 certainly hasn't gone unnoticed. This really is, it seems to
12 me, anyway, among some of the more contention interactions
13 between the lawyers.

14 Again, I'm not trying to rein people in in terms of being
15 zealous advocates, but, when it comes to things like this,
16 let's please do our best to keep it within the bounds of normal
17 in terms of volume level, okay? All right. We'll bring the
18 jury in.

19 (The Jury enters the courtroom.)

20 THE COURT: Mr. Vitt, redirect?

21 REDIRECT EXAMINATION BY ATTORNEY VITT

22 Q. Thank you. Dr. Bancroft, all set?

23 A. Yes.

24 Q. You were asked on cross-examination if you had worked with
25 my firm and Eric Jones's firm on other employment matters,

1 correct?

2 A. Yes.

3 Q. Do you also with work with Downs Rachlin Martin, the firm
4 Mr. Coffin is associated with?

5 A. Yes.

6 Q. For how long a period?

7 A. I believe my first litigation case for them was in 1984,
8 and I just finished up one with them in January of this year.

9 Q. I'd like to direct your attention, if I may, to the 2023
10 earnings for Dr. Porter. Had you obtained documents from Dr.
11 Porter to support the earnings data that you provided in your
12 report?

13 A. Yes.

14 Q. Was it relevant whether Dr. Porter was a full professor or
15 not, so long as you had accurate salary information for her for
16 that year?

17 A. No, it wasn't relevant. What I want is the actual.

18 Q. All right. And you actually had the actual numbers that
19 you obtained from documents provided by Dr. Porter?

20 A. Yes.

21 Q. There is a question or two about reductions in
22 Dr. Porter's salaries in 2016 and 2017 at Dartmouth-Hitchcock.
23 Was she on disability during those years?

24 A. Yes.

25 Q. Did that have an impact on her salary?

1 A. Yes.

2 Q. I'm going to show you what has been marked as -- I think
3 it's C13. It's defendant's June 5, 2017 letter to Dr. Porter
4 and then a number of documents, including a confidential
5 separation agreement and general release. Hand that up to you.

6 Over the years in working on employment cases, have you
7 seen settlement documents that include a general release?

8 A. I'm sorry.

9 Q. Have you seen settlement documents that include a general
10 release over the years in working on employment cases?

11 A. I probably have. None come to mind.

12 Q. All right. If you look at that, there is a reference to,
13 I think, Paragraph 4, a general release. Do you see that,
14 Paragraph 4?

15 A. Paragraph 4 on the June 5, 2017 --

16 Q. Yes

17 A. -- letter?

18 Q. Well, actually, it's in the document. I'm sorry. My
19 fault. Okay. I'll get it for you. Hold on. What's the title
20 of that paragraph?

21 A. Paragraph 4?

22 Q. Yes, please.

23 A. Release by physician.

24 THE COURT: Mr. Vitt, I'm not seeing this exhibit.
25 Did you intend to show this exhibit or just ask the witness

1 about it?

2 ATTORNEY VITT: Actually, if I could show it, I would
3 appreciate it, Judge.

4 THE COURT: Okay. This is admitted?

5 ATTORNEY VITT: Yes, C13.

6 THE COURT: Yes.

7 ATTORNEY VITT: If that's the case, if you'll give
8 that back to me, it will show up here on your screen.

9 THE WITNESS: Do you want the whole packet?

10 BY ATTORNEY VITT:

11 Q. Thanks. I realize you're an economist and don't spend a
12 lot of time reading general releases and documents like that,
13 but are you aware generally that, when employment cases get
14 settled, the person receiving money is expected to release any
15 and all claims that they have against the employer?

16 A. That's sort of roughly my understanding, but, again, I
17 have all I can do to handle the economics.

18 Q. And, right, and if you go to Paragraph 5, there is a move
19 to Paragraph 5.

20 A. It's not here.

21 Q. Oh, it's not on your screen? Let me put it here. Thank
22 you. Do you see that?

23 A. Paragraph, what's the first couple words? The term?

24 Q. Paragraph 5 confidential physician --

25 A. Oh, yes okay. Yes.

1 Q. "Physician agrees to keep the terms and conditions
2 relating to this agreement confidential", do you see that?

3 A. Yes.

4 Q. Okay. And then I'm going to put Paragraph 6 up here
5 entitled "nondisparagement". Do you see that?

6 A. Yes.

7 Q. The first sentence, "Neither physician nor anyone acting
8 on physician's behalf will make derogatory, disparaging, or
9 critical statements about employer or any employer releasee".
10 Do you see that?

11 A. Yes, I do.

12 Q. So, given the obligations that Dartmouth-Hitchcock sought
13 to impose on Dr. Porter in order to receive this payment of
14 \$228,000, did you see any reason that that \$228,000
15 hypothetical payment should be reflected in your report?

16 ATTORNEY COFFIN: Objection, totally leading.

17 THE COURT: I'll allow it.

18 THE WITNESS: No.

19 THE COURT: Go ahead. You may answer the question.

20 THE WITNESS: No.

21 BY ATTORNEY VITT:

22 Q. No reason to include it, correct?

23 A. No.

24 ATTORNEY VITT: Nothing further.

25 THE COURT: Any recross, Mr. Coffin?

1 ATTORNEY COFFIN: Yeah, briefly, Your Honor.

2 RECROSS-EXAMINATION BY ATTORNEY COFFIN

3 Q. You testified that, beginning in 2025 for this analysis,
4 one of your assumptions is the plaintiff would be working .75
5 hours for her position at UVMC; isn't that right?

6 A. Yes, starting July 1.

7 Q. And yet you continued when she was at Dartmouth from 2025
8 until your posited age of her retirement in 2033 --

9 ATTORNEY VITT: Objection.

10 BY ATTORNEY COFFIN:

11 Q. -- that she would be working in a full position; isn't
12 that right?

13 ATTORNEY VITT: Objection, Judge. This is beyond
14 scope.

15 THE COURT: No, I'll allow this.

16 ATTORNEY VITT: All right.

17 THE WITNESS: Yes, I'm assuming. Based on her salary
18 at the time she was terminated, I've used that number to go
19 forward, and I'm assuming that was for a full-time position.

20 BY ATTORNEY COFFIN:

21 Q. Your assumption is, while at Dartmouth, she would work
22 from 2025 until her posited retirement age in 2033 full time,
23 correct?

24 A. Yes, I think that's the case.

25 Q. While at UVM she would work from 2025 until the time of

1 her retirement in 2033 only at .75; isn't that correct?

2 A. Yes.

3 Q. And that's based on what she told you; isn't that correct?

4 A. Yes.

5 Q. Now, the difference between what she's making at Dartmouth
6 as a full-time employee and what she's making at UVMMC as a
7 theoretical .75 employee you calculate each year as damages
8 incurred by the plaintiff; isn't that right?

9 A. Yes.

10 Q. So, if she's working less than full time at UVMMC, her
11 damages are increased just because of that hypothesis?

12 A. If she's working -- yes.

13 Q. And we went through some of the numbers which showed, if
14 you converted the .75 first to full time during her '25 through
15 '27 UVMMC employment, she actually would be making more in
16 salary at UVMMC; isn't that right?

17 A. Yes.

18 Q. Now, we talked a little bit about your cases, your prior
19 work as an expert witness, and we talked about 2,500 cases, and
20 it was hard to pin down some amounts related to your less
21 recent work. Let me ask you about your more recent work.

22 If we take the 500 cases or so that you've described doing
23 since the time of your deposition in October of 2019, I think
24 you said that was your estimate about the number of cases
25 you've done, correct?

1 ATTORNEY VITT: Objection.

2 THE WITNESS: That was what is on my resume.

3 THE COURT: Dr. Bancroft, please don't answer the
4 question.

5 ATTORNEY VITT: Objection, Judge. This is well
6 beyond scope of what I covered in my redirect.

7 THE COURT: Sustained.

8 ATTORNEY COFFIN: No further questions.

9 THE COURT: All right. Dr. Bancroft, you may step
10 down. Plaintiff may call the next witness.

11 ATTORNEY NUNAN: We call Leslie DeMars.

12 Leslie DeMars,

13 having been duly sworn to tell the truth,

14 testifies as follows:

15 THE COURT: Please proceed.

16 ATTORNEY NUNAN: Just a technical issue, can we shut
17 the ELMO off? I'm going to plug in my computer. The document
18 that's going to come up first has already been admitted, 83.

19 THE COURT: Okay.

20 ATTORNEY SCHROEDER: Sorry, Sarah. What number is
21 that?

22 ATTORNEY NUNAN: 83. Sorry.

23 ATTORNEY VITT: If you could get a little closer to
24 the microphone --

25 ATTORNEY NUNAN: Yeah, not a problem. I have one

1 more thing. I'd like to get Dr. DeMars a book of the documents
2 so that she can read the paper version in full before I ask her
3 questions about them. Is that okay?

4 THE COURT: Okay.

5 ATTORNEY NUNAN: Easier to read them in paper than it
6 is to review them all. So the only two that are in the second
7 notebook are here. So I'll just direct you when the time
8 comes.

9 DIRECT EXAMINATION BY ATTORNEY NUNAN

10 Q. Good afternoon, Dr. DeMars. My name is Sarah Nunan. Will
11 you please tell me your medical education history?

12 A. So I was a medical student at the University of Vermont.
13 I then did my residency and fellowship at the University of
14 North Carolina, Chapel Hill.

15 Q. And did you come to Dartmouth-Hitchcock about 1996?

16 A. 1997.

17 Q. Great. Was that your -- let's see. What was your
18 specialty when you got there?

19 A. Gynecologic oncology.

20 Q. And you worked in the OB/GYN department?

21 A. Yes. GYN oncology is a subspecialty of obstetrics and
22 gynecology.

23 Q. And you came to Dartmouth-Hitchcock the same time as
24 Dr. Porter?

25 A. Approximately, yes.

1 Q. And when did you leave Dartmouth-Hitchcock?

2 A. End of December 2018.

3 Q. 2018? Okay. Are you a board examiner?

4 A. Not anymore.

5 Q. Were you for a period of time?

6 A. Yes.

7 Q. How many years?

8 A. 20.

9 Q. Okay. Any other honors that you had over the course of
10 your career?

11 A. None that I would count as being subspecialty oriented.

12 Q. Great. If you want to open up your notebook to Tab 83, I
13 have most of the documents here, but, if you like the paper
14 copy, it's there. You all set?

15 A. Yes.

16 Q. Okay. This is the email that Dr. Merrens received from
17 Nurse Victoria Maxfield. Do you know who she is?

18 A. Yes.

19 Q. And he makes statements at the top of the page to Nurse
20 Maxfield. He says, "As you know, Dr. Porter currently works at
21 20 percent of her time". Do you see that?

22 A. Yes.

23 Q. So this was in May of 2017. Dr. Porter was back working.
24 Do you know if that is a correct statement?

25 A. It's difficult to put exactly together how many hours

1 Dr. Porter was working from month to month, and the timeline is
2 really hard to remember. Dr. Porter was working a limited
3 number of hours in a limited capacity.

4 Q. Fair. If I, if I said to you that she was not working one
5 day a week, but that she was working four days a week, she was
6 working approximately 50 percent of the time, would you
7 disagree with me?

8 A. I would disagree with you.

9 ATTORNEY SCHROEDER: Objection. Calls for
10 speculation. I realize this is on cross, but --

11 THE COURT: Sustained. I

12 ATTORNEY SCHROEDER: And, Dr. DeMars, just wait until
13 the objection is handled by the judge. Thank you.

14 BY ATTORNEY NUNAN:

15 Q. Dr. Merrens says here, "The recommendation around the
16 closing of the program and its staff, and its staff were at the
17 recommendation of Dr. DeMars". Do you agree with that
18 statement?

19 A. I disagree that I recommended to close the division. We
20 had recommended that we close temporarily the IVF services at
21 DH.

22 Q. Was it your experience that the administration conflated
23 IVF and the other resources, the other services that the REI
24 division provided?

25 ATTORNEY SCHROEDER: Objection, Your Honor. Assumes

1 facts not in evidence.

2 THE COURT: Sustained. I'll ask you to rephrase the
3 question.

4 BY ATTORNEY NUNAN:

5 Q. Okay, sure. When there were discussions about closing the
6 division, was it your experience that they were saying to you
7 that the IVF portion was what the REI doctors did?

8 A. I don't think that's an accurate representation.

9 Q. Okay. How much of the REI division was IVF?

10 A. I can't give you a percentage because each, each REI
11 division member had their own particular interests.

12 Q. Would it be fair to say that it was somewhere between 10
13 and 20 percent?

14 ATTORNEY SCHROEDER: Objection, Your Honor. Assumes
15 facts not in evidence.

16 THE COURT: Overruled.

17 THE WITNESS: That may have represented Dr. Porter's
18 practice, but it probably did not represent the practice of the
19 other members of the division.

20 BY ATTORNEY NUNAN:

21 Q. Okay. Will you take a look at what time Dr. Merrens sent
22 this email? Do you agree it's sent at 2:19 p.m.?

23 A. Yes.

24 ATTORNEY NUNAN: Okay. I would like to show the
25 Witness Exhibit 89.

1 THE COURT: Is that admitted in evidence, Ms. Nunan?

2 ATTORNEY NUNAN: It is not.

3 THE COURT: Okay.

4 (Plaintiff Exhibit 89 was shown to the Witness.)

5 BY ATTORNEY NUNAN:

6 Q. Dr. DeMars, is this an email that you sent to Daniel
7 Herrick?

8 ATTORNEY SCHROEDER: Counsel, just, I don't want to
9 interrupt your question, but it's a pretty long email. So I'd
10 just, if you want her to read it, all of it, that's fine. I
11 just --

12 ATTORNEY NUNAN: Sure. I'd like to get it admitted
13 in evidence before she starts reading it.

14 BY ATTORNEY NUNAN:

15 Q. I'm sorry. At the top is this an email that you sent to
16 Ed Merrens?

17 A. It's a series of emails that I sent to Ed Merrens, yes.

18 Q. And the date is May 14th 2017?

19 A. There's one from May 12th and one from May 14th.

20 ATTORNEY NUNAN: Sure. I'd like to move this into
21 evidence.

22 THE COURT: Any objection?

23 ATTORNEY SCHROEDER: No objection.

24 THE COURT: Okay. Plaintiff's 89 is admitted.

25 (Plaintiff Exhibit 89 is admitted into evidence.)

1 BY ATTORNEY NUNAN:

2 Q. So I'd like to go to the last page on Page 3. We had
3 mentioned in Exhibit 83 that Ed Merrens had sent an email May
4 12th at 2:19, and this email at the very bottom, he turns
5 around at 2:27 and sends you an email; is that correct?

6 A. Yes.

7 Q. Is it says, "Leslie, I'm getting inundated with heartfelt
8 and long emails wondering why Misty can't stay on to do her
9 ultrasound complex operative and teaching role even if we end
10 REI. I suspect that you considered this in the evaluation of
11 the program and your knowledge of Misty. I just need to know
12 how to better answer these, this question".

13 Did I read that correctly?

14 A. Yes.

15 Q. I'd like you to turn to the first page now where you
16 respond at 5:59 p.m. You say, "Yes, there has been enormous
17 backlash, mostly heartfelt based on Misty's longevity and with
18 only a token nod to the elephant in the room of her disruptive,
19 slash, splitting behavior that everyone has seen. They are
20 angry and fearful that, if Misty could be terminated, any of us
21 could be".

22 And I'm going to skip down to the second highlighted part
23 that says, "Everyone is also remembering Misty as a full-time
24 employee wearing three hats and not the one who has been out
25 for almost 18 months". Did I read that correctly?

1 A. Yes.

2 Q. Being out for 18 months, you're referring to her
3 short-term then long-term disability?

4 A. That she has not been work full term for almost, full time
5 for almost 18 months.

6 Q. And, when you say three hats, what do you mean?

7 A. That Misty was a skilled gynecologic surgeon, she was a
8 skilled ultrasonographer, and she was a skilled infertility
9 physician.

10 Q. I'd like turn to turn to the next page.

11 ATTORNEY SCHROEDER: And, just for the record,
12 Counsel, is this your highlighting as opposed to the actual
13 document that's been admitted?

14 ATTORNEY NUNAN: It is. It is. In my attempt to run
15 my own exhibits.

16 ATTORNEY SCHROEDER: Nothing wrong with that.

17 ATTORNEY NUNAN: I asked Geoffrey to, but I decided I
18 needed a little guidance. So please forgive me. This is my
19 highlighting to keep me on track.

20 ATTORNEY SCHROEDER: Just wanted the record to
21 reflect that. Thank you.

22 BY ATTORNEY NUNAN:

23 Q. Yeah, okay. So this paragraph that's highlighted is one,
24 two, three, four down. It's not going to be highlighted on
25 your paper document, but you can see it on the screen. I'm

1 going to read what you wrote here: "Misty's medical disability
2 has been devastating, and I'm not sure that she should or will
3 really ever be able to do the complex hysteroscopy or
4 laparoscopy that she once did. That being said, there are a
5 few full-spectrum REI docs that could bring similar surgical
6 skills, but they are hard to find. I think that the best
7 outcome of this termination is the chance for Misty to actually
8 be out on leave with no intervening responsibilities so she can
9 assess how much she, how much improvement she might gain".

10 Did I read that correctly?

11 A. You did.

12 Q. That was your decision to make for Misty?

13 A. Excuse me.

14 Q. That was your decision, the best outcome of the
15 termination was for Misty to go off?

16 A. That was -- I disagreed with the decision to close the
17 division. Heather Gunnell and I, with Daniel Herrick, were
18 trying to put a plan in place by which we could pause IVF
19 services, maintain Misty as an employee, and eventually reopen
20 IVF services. Those plans we were unable to present to
21 leadership, and those plans were designed to be, to allow Misty
22 to recover on her own time. My statement that her termination
23 would allow her to recover was my heart speaking that she was,
24 she would be allowed to recover without the stress and chaos of
25 the IVF service. It was never my intention that I thought she

1 would be better off by being terminated, nor did I agree that
2 she should be terminated.

3 Q. You didn't agree that she should be terminated?

4 A. I did not.

5 Q. Okay. I would like to go down to the next paragraph. It
6 says, "As much as it hurts, it was the right decision to
7 include her in the terminations, and I don't want to change
8 that decision".

9 A. At this point, the decision had been publicized. I
10 disagreed with it. I was unable to argue my disagreement, and
11 I was unable to turn back the fact that the actions had been
12 taken, the terminations actions had been taken, and it had been
13 publicized.

14 Q. Further down you say, "If she doesn't really get better
15 and can only work 16 to 20 hours a week, she will have to
16 choose between ultrasound and REI and will be an effective
17 teacher for the REI fellowship at UVM".

18 So you're telling me that you are not -- you wanted her to
19 stay on at Dartmouth-Hitchcock?

20 A. I absolutely wanted her to stay on. I had a job for her
21 that I was trying to plan.

22 Q. And you do not see Dr. DeMars's (sic.) email on the third
23 page as asking you why she can't do those other three items
24 that you counseled she was so skilled at?

25 A. I was not allowed to present that plan before the decision

1 was made to terminate the decision -- the division. If I said
2 decision, sorry. I think Misty was an incredible, valuable
3 department member.

4 Q. I have another question for you. Dr. DeMars writes back
5 to you that what you've written is a comprehensive, thoughtful,
6 and appropriate insight. Do you see that?

7 A. Yes.

8 Q. "Ultimately, once the dust settles, we'll be in a better
9 position with all of this, including Misty."

10 Did you think Misty was in a better position being
11 terminated?

12 A. That's a really hard question to answer.

13 Q. Okay. I'll ask you another question. Was Misty not as
14 useful to you when she could not wear three hats because of her
15 disability?

16 A. It wasn't about me. Misty was on leave, and my job was to
17 protect her leave and help her and allow her to get better.

18 Q. So that was your decision, to terminate her so that she
19 could recover?

20 A. It was not my decision to terminate her.

21 Q. But you agreed that terminating her would allow her to
22 recover?

23 A. She would have remained on leave. Had she not been
24 terminated, she still would have been on leave.

25 Q. Are you referring to the fact that she came to you in late

1 April and said she had to have another surgery?

2 A. No. That she wasn't fully recovered yet and she was still
3 on leave and she would have been on leave throughout much of
4 2017. We had no idea what was to come, but she was still not
5 back to being fully recovered, and she would have still been on
6 leave, and I wanted to protect a position for her.

7 Q. Okay. I'd like you to turn to Document 2 in your book.
8 This is Plaintiff's Exhibit 2. Dr. DeMars, this is an email
9 written to you.

10 A. I'm not even close to that yet. Sorry.

11 Q. Thank you for letting my know. You let me know when
12 you've reviewed it.

13 ATTORNEY SCHROEDER: And just give her a hot second
14 to actually read the text.

15 THE COURT: I'm going to ask counsel to approach,
16 please.

17 (Bench conference begins.)

18 THE COURT: So you may want to object, but I'm not so
19 sure you should be giving a narrative of what the Witness
20 should do. That's my job. So you can make an objection or
21 have a bench conference instead of talking to the Witness.

22 ATTORNEY SCHROEDER: Understood.

23 THE COURT: All right.

24 (Bench conference ends.)

25 BY ATTORNEY NUNAN:

1 Q. Are you set?

2 A. Yes.

3 Q. Great. You received this -- no. You sent this email to
4 Dr. Reindollar on September 17th 2015; is that correct?

5 A. Yes.

6 ATTORNEY NUNAN: I'd like to move for the admission
7 of Plaintiff's Exhibit 2.

8 THE COURT: Any objection?

9 ATTORNEY SCHROEDER: No objection.

10 THE COURT: Plaintiff's Exhibit 2 is admitted.

11 (Plaintiff Exhibit 2 is admitted into evidence.)

12 BY ATTORNEY NUNAN:

13 Q. I'm going to read to you starting at, "I need some
14 advice". "I need some advice about unbiased performance
15 evaluation. Albert is still struggling. Technical competence,
16 ovulation induction plans, basic endocrine and infertility
17 knowledge, timely completion of medical records, and he hasn't
18 told us if he's passed his written boards, parentheses, I know
19 the results are out. UVM can't review his clinical competence
20 in infertility world, in the infertility world. Does ASRM have
21 resources to evaluate clinical practice? I can't go by MBP's
22 evaluation, and I do think that she has been good" -- I think
23 you mean at, but -- "a providing guidance, at least initially".
24 Did I read that correctly?

25 A. Yes.

1 Q. Okay. First off, is Albert referring to Dr. Albert Hsu?

2 A. Yes.

3 Q. And is MBP Dr. Porter?

4 A. Yes.

5 Q. Okay. And I want to start with the last phrase about what
6 I believe is Dr. Porter, "And I do think that she has been good
7 at providing guidance, at least initially".

8 Dr. Porter spent six months training Dr. Hsu when he first
9 arrived, didn't she?

10 A. Yes.

11 Q. Okay. He came out of the Jones Institute?

12 A. Yes.

13 Q. He had had a fellowship?

14 A. Yes.

15 Q. It was of poor quality?

16 A. According -- Dr. Porter had concerns about Dr. Hsu coming
17 to Dartmouth because of the experience that he would have had
18 at the Jones Institute.

19 Q. And she spent six months of nights and weekends working
20 with him. He didn't have his own independent schedule; is that
21 right?

22 A. I don't remember.

23 Q. Okay. Do you remember her spending six months of nights
24 and weekends and call with him?

25 A. I don't remember, but that I wouldn't be surprised.

1 Q. Okay. And what you're saying, I believe, here is that she
2 worked hard with him, she gave him good guidance?

3 A. Initially. I think that it was her responsibility to
4 bring Dr. Hsu up to a level of competence.

5 Q. And she trained residents?

6 A. She trained residents.

7 Q. And, eventually, she trained fellows as well?

8 A. Eventually, yes.

9 Q. Okay. And you saw her? That was her responsibility?

10 A. Yes.

11 Q. Okay. And she was competent to do that?

12 A. Yes.

13 Q. So I'm going to direct you to the first statement which
14 is, "I need some advice about unbiased performance evaluation",
15 and then down below you say, "I can't go by MPB's evaluation".
16 Why?

17 A. There were two conversations that I had with before I, I
18 -- excuse me. There were two conversations that I had that
19 concerned Dr. Porter's history of being critical and
20 undermining members of the REI division.

21 Q. Okay. Let's start with her being critical. Was she
22 demanding?

23 A. Yes

24 Q. Did she have high standards?

25 A. She had her standards?

1 Q. Which were high?

2 A. Which I think were high. We all have to understand that,
3 when we are trying to evaluate competence as we try to evaluate
4 competence at our board exams, that there is a spectrum of what
5 is competent and what is not competent, and there is a very
6 wide spectrum of competence. I believe Dr. Porter had a very
7 high standard of competence and was very critical of anyone who
8 did not rise to her standard or she didn't expect could rise to
9 her standard. That caused friction among department members,
10 division members. It caused friction among division
11 physicians, and it was a longstanding behavior.

12 Q. So her standard of care for her patients was too high?

13 A. Her standard of care was her standard of care.

14 Q. Fair enough.

15 A. She refused to acknowledge that there was a range of what
16 is standard of care.

17 Q. And, when people in the department came to you over the
18 next two years and reported concerns about Albert Hsu and
19 patients, is that explanation right there the one that you gave
20 them?

21 A. I'm not sure I understand your question.

22 Q. Sure. Sharon Parent testified that she came to you and
23 said, "I am watching Dr. Seifer" -- this is not Dr. Hsu -- "I'm
24 watching Dr. Seifer hurt patients, hurt the women that come to
25 this department, and I have concerns", did you tell her what

1 you just said here, which is Dr. Porter's standards are too
2 high, and you have to understand that some doctors are
3 different than Dr. Porter and we have to accept that?

4 A. I never said that Dr. Porter's standards were too high,
5 first of all.

6 Q. Okay. I think Dr. Porter is an excellent physician. She
7 is a fantastic physician.

8 Q. I agree with that.

9 A. I think that I was told very early on that Dr. Porter had
10 a very long history --

11 Q. Is there any -- excuse me. I'm going to interrupt you.
12 Is this by Dr. Reindollar?

13 A. It's by more than Dr. Reindollar.

14 Q. Who? Who told you this?

15 A. Dr. --

16 ATTORNEY SCHROEDER: Objection, Your Honor.

17 THE COURT: Okay. Basis?

18 ATTORNEY SCHROEDER: Not allowing her to finish her
19 answer.

20 ATTORNEY NUNAN: Excuse me. Go ahead.

21 THE COURT: To the extent that's the objection,
22 sustained.

23 BY ATTORNEY NUNAN:

24 Q. So I'm hearing Dr. Reindollar and Dr. Manganiello?

25 A. And Dr. Manganiello.

1 Q. Dr. Manganiello left the practice in 2009; is that
2 correct?

3 A. Maybe.

4 Q. And Dr. Reindollar, I'm not going to get this quite right,
5 but approximately at the end of 2013?

6 A. Yes.

7 Q. I'd like to get back to what you're saying about Albert
8 Hsu here. You list a pretty wide range of issues that he is
9 having; is that correct?

10 A. Yes. I think I'm reflecting what, what Misty had, what
11 Dr. Porter had reported to me.

12 Q. Okay.

13 A. And I'm trying to find some, some way of an unbiased
14 performance evaluation because I've been told that Dr. Porter's
15 performance evaluations can be biased, can be deliberate, and
16 they can be, they can be designed to split the division and to
17 cause discord within the division. So I'm looking for
18 independent confirmation of what Dr. Hsu's competence is.

19 Q. But Dr. Hsu -- you don't attribute these statements to Dr.
20 Porter; is that correct? And you have the knowledge here that
21 he is struggling?

22 A. So I don't know what these, what these exact points, to
23 whom I should be attributing those to at this point, no.

24 Q. Okay. At the point that you wrote this email, Dr. Porter
25 hadn't gone out on disability yet -- is that right -- September

1 2015?

2 A. I don't know.

3 Q. Okay. Did you go to Dallas with Dr. Porter Novemberish of
4 2015 to the board examiners?

5 A. Probably December.

6 Q. Normally, you go in November, December?

7 A. Normally, we went December.

8 Q. Okay. And that's something the two of you had done for
9 years?

10 A. Yes.

11 Q. Okay. And in 2015 do you remember Dr. Porter developing
12 double vision and headaches while she was at the boards?

13 A. I have a vague recollection of it, yes.

14 Q. And is it your recollection that she went out on
15 short-term disability in December of 2015 and, while she might
16 have worked a little bit in the next six months, she was out
17 for approximately six months on short-term disability?

18 A. For the first half of 2016, yes.

19 Q. Okay. You do remember that?

20 A. Yes.

21 Q. Okay. Dr. Karen George testified that Dr. Porter was
22 excellent at assessing where a resident was in their skill set
23 and then advancing them. Do you agree with Dr. George's
24 assessment of Dr. Porter?

25 ATTORNEY SCHROEDER: Objection, Your Honor.

1 THE COURT: Okay. Basis?

2 ATTORNEY SCHROEDER: She wasn't here for that
3 testimony, and I think this is -- well, can I be heard sidebar?

4 THE COURT: Yes.

5 (Bench conference begins.)

6 ATTORNEY SCHROEDER: Sure. The objection is that
7 she's characterizing the testimony that has been heard as if
8 that is the testimony, and I don't know that that's -- she's
9 saying this is what she said. I don't believe that that's
10 necessarily the case.

11 THE COURT: Do you have a reason to think it's
12 inaccurate?

13 ATTORNEY SCHROEDER: Well, I think it's -- I don't
14 know that it's accurate, and I don't know that -- it's a
15 long-winded question relating to something that obviously she
16 can ask, If she said this, would you agree with that? I'm just
17 struggling with the fact that, yes, it's on cross. I
18 understand that. But saying that this is what this person
19 testified to as a declarative statement without any
20 verification of that, I don't recall her saying exactly those
21 words, so, you know, I don't recall it specifically.

22 I just, if we're going to have all these questions based
23 upon testimony that this witness would not have heard because
24 she wasn't here because she was sequestered -- she can ask, If
25 this person testified this way, would you agree with it?

1 That's perfectly fine, but to say this is what this person
2 testified to, you know, unless she's got a record in front of
3 her of the transcript, I'm not going to feel comfortable saying
4 that that's exactly what was said, and I think it's a fair
5 objection just based on the circumstances of this being a
6 person being called as for cross.

7 ATTORNEY NUNAN: I believe that it's evidence that is
8 in the record. Dr. George said that one of Dr. Porter's skills
9 was assessing residents where they stood and advancing them. I
10 thought that was in evidence.

11 THE COURT: I think that's his point is that he's not
12 sure if it's in evidence as you are describing it. So,
13 apparently, if you say to her, If the Witness has testified to
14 the following, would you agree with that --

15 ATTORNEY SCHROEDER: Right. And I think that's a
16 fair statement and, correct, that's a fair question, just so
17 that I'm not coming up here for objections on this point. But
18 thank you.

19 THE COURT: Right.

20 (Bench conference ends.)

21 BY ATTORNEY NUNAN:

22 Q. If Dr. Karen George testified that Dr. Porter was
23 excellent at assessing residents' abilities and helping them
24 develop their skills in REI, would you disagree with that
25 statement?

1 A. I would not. I would confine it to REI.

2 Q. Thank you. I'd like to look at the bottom paragraph where
3 you state, "Also, I need to find an REI doctor with seniority
4 who could put Albert under his wing". Is this the email that
5 eventually led to the recommendation of David Seifer?

6 A. It led to opening up the search.

7 Q. Dr. Reindollar did not give you a recommendation?

8 A. No.

9 Q. And the search turned up David Seifer?

10 A. The search eventually turned up David Seifer. We had
11 searched before. We had had a search open for quite some time,
12 and, ultimately, we did hire Dr. Seifer.

13 Q. You and Dr. Porter interviewed Dr. Seifer in the fall of
14 2015?

15 A. I don't know when the dates were, honestly, at this point.
16 He was interviewed by more than Dr. Porter and myself.

17 Q. I'd like you to turn to Exhibit 7 in your book. Have you
18 reviewed it?

19 A. Yes.

20 Q. Okay. Is this an email that you wrote to Maria Padin?

21 A. Yes.

22 Q. Okay. On May 12th 2016?

23 A. Yes.

24 ATTORNEY NUNAN: I'd like to move the admission of
25 Plaintiff's Exhibit 7.

1 THE COURT: Any objection?

2 ATTORNEY SCHROEDER: No objection.

3 THE COURT: Plaintiff's 7 is admitted.

4 (Plaintiff Exhibit 7 is admitted into evidence.)

5 BY ATTORNEY NUNAN:

6 Q. You write here, "Maria, I would like to meet or talk with
7 you as soon as possible to discuss David's assessment. His
8 position is essential to keeping the REI division afloat, and I
9 do feel the evaluation that he received from his peers", and
10 you put that in quotes, "were vindictive and not a good
11 representative, and not a good representation of his value and
12 ability. The picture that I received from David, the chair
13 Aaron Caughey, and the laboratory director just don't mesh with
14 his past performance or with the person. I am concerned that,
15 if we cannot hire Dr. Seifer, that I will have to shut the
16 program down with Misty Blanchette Porter still out on medical
17 leave and Albert Hsu, my junior member, hanging by a thread.
18 Even with Misty returning, we need different leadership."

19 Did I read that pretty much correctly?

20 A. Yes, you did.

21 Q. Is it fair to say that, in January to the time you wrote
22 this email, Dr. Hsu was not doing well in the REI division?

23 A. Dr. Hsu was overworked, overstressed, and had no support.

24 Q. It was not going well; is that a fair characterization?

25 A. It was really difficult for him. He, if you back up to

1 his hiring, he was a junior faculty member who came from a
2 program that didn't give him the requisite experience that he
3 needed to be, to be able to hit the ground running.

4 Q. I have a question for you. When Dr. Porter finished her
5 six months, nights, weekends with Dr. Hsu, did she talk to you
6 then about Albert Hsu?

7 A. I don't remember.

8 Q. And did he then go out and have his own schedule? He was
9 no longer -- he was actually independent?

10 A. I don't remember.

11 Q. Okay. And, if I represented to you that, when he went out
12 on his own after that six months and his skills reverted, is
13 that a conversation you remember having with Dr. Porter?

14 A. If the timing is correct, six months would have been
15 somewhere at the beginning of 2015, and, if his skills had
16 reverted, then it was back to Dr. Porter for additional
17 training and support.

18 Q. Wasn't he brought in in the beginning of 2014?

19 A. No.

20 ATTORNEY SCHROEDER: Objection, Your Honor.

21 BY ATTORNEY NUNAN:

22 Q. Okay. So, if Dr. Porter saw his skills revert and she got
23 out her teaching slides and then went over them again with him
24 and had a discussion with you, do you remember that discussion?

25 A. No. But this was her responsibility to bring his skills

1 back up.

2 Q. Do you remember Dr. Porter telling you he was untrainable?

3 A. I don't remember that. I also don't believe anyone is
4 untrainable who makes it that far. I think that's a fairly
5 inflammatory statement and, again, in keeping with some of the
6 behavior that I was told Dr. Porter had done over the years.

7 Q. I'd like you to turn to Document 123. We have 123A. I
8 think your notebook only has 123, but I will -- actually, I
9 think it's right up there. You're right. 123A, I did get a
10 copy.

11 I'd just like to ask Emerson. If my management of this is
12 unbearable, will somebody speak up?

13 COURTROOM DEPUTY: No. You're good. Yes, thank you.

14 ATTORNEY NUNAN: Great. This document is admitted,
15 right, so I can show the jury?

16 THE COURT: Yes, 123A is admitted.

17 (Witness reading.)

18 BY ATTORNEY NUNAN:

19 Q. Okay. Are you finished?

20 A. Yes. Skimming through it, yes.

21 Q. Thank you. Did you ask Dr. Porter to write an assessment
22 of Dr. Hsu?

23 A. I don't remember.

24 Q. Do you remember telling Dr. Porter to have a discussion
25 with Dr. Seifer about Albert Hsu?

1 A. I don't remember.

2 Q. Okay. Do you remember Dr. Seifer being hired about May of
3 2016?

4 A. Yes.

5 Q. And do you remember Dr. Porter returning in a more
6 consistent fashion about June, May or June of 2016 from her
7 short-term disability?

8 A. No.

9 Q. You don't remember that?

10 A. No, she didn't return in a more consistent fashion. She
11 returned in a very limited fashion and primarily to do
12 ultrasound.

13 Q. Okay. But she was in the REI division --

14 A. Yes.

15 Q. -- at that time? And do you believe that that document
16 there was a document she was asked to write?

17 A. I can't tell you that.

18 Q. Okay. And what is the overall conclusion Dr. Porter comes
19 to in that eleven-page document?

20 A. Dr. Porter concludes, "With the clinical demand and his
21 observed deficiencies, it is not appropriate for Dr. Hsu to be
22 employed at DHMC".

23 Q. Was Dr. Porter in a position to assess Dr. Hsu?

24 A. She was in a position to provide her opinion. She was in
25 a position to provide her observations of Dr. Hsu directly. I

1 think what is most challenging is interpreting her opinion and
2 the reports of anything that was going on between January of
3 2016 and June of 2016 where she was primarily not at DH and she
4 was on medical leave.

5 Q. I'm glad you brought that up. I'm going to ask you a
6 question about that. When she got back from her disability,
7 did you ask her to take over the care of some patients that had
8 not been well cared for by Albert Hsu?

9 A. I would have asked her to take over care of some of the
10 patients if those were patients that were, that may have been
11 previously her patients. They may have previously been
12 Dr. Hsu's patients. We had several patients that were, that
13 were quite challenging IVF patients that, again, Dr. Porter is
14 a fantastic IVF doctor.

15 Q. That didn't quite answer my question. My question was --

16 A. Well, I'm not sure I can answer that question.

17 Q. Do you remember discussing with Dr. Porter giving free IVF
18 cycles to people who had been treated by Dr. Hsu while she was
19 out on disability?

20 A. We had, we, as in the department, had made the decision to
21 provide an uncompensated IVF cycle to at least one couple that
22 I can remember. The circumstances around that uncompensated
23 cycle, to me, weren't very clear, and it made more sense to be
24 able to offer an uncompensated cycle to that particular couple.
25 A second one I don't remember.

1 Q. So, when you receive a document -- I would like to go
2 through kind of some of the elements, just the points in this
3 document. On Page 3 she says, "Below are my observations and
4 opinions with regard to her performance". She lays it all out
5 there. It's comprehensive, isn't it?

6 A. Yes.

7 Q. She has, "One, marked global fund of knowledge deficiency
8 in REI and general gynecology." On Page 6 -- give you a second
9 to turn there -- she has, "two, critical thinking". She says,
10 "Most concerning to me has been my observation that Dr. Hsu
11 struggles with critical thinking and assessment. He has
12 difficulty identifying pieces of data in a patient's or
13 couple's evaluation which are the most salient and require
14 attention".

15 A. What you skipped over also is that Dr. Hsu passed his oral
16 general board exams which --

17 Q. But not his written, right?

18 A. He had to have passed his written general board exams to
19 be able to take his oral board exams. So he passed his oral
20 board exams in general obstetrics and gynecology, which
21 directly assesses his ability to synthesize information, and
22 general obstetrics and gynecology directly assesses his ability
23 and performance of general gynecology.

24 Q. So that fact alone tells you that whatever is written in
25 this document shouldn't be taken seriously?

1 ATTORNEY SCHROEDER: Objection, Your Honor.

2 THE COURT: I'll allow it.

3 THE WITNESS: I think that it needs to be taken as
4 Dr. Porter's opinion and with a grain of salt.

5 BY ATTORNEY NUNAN:

6 Q. Can you explain one more time why I need to take a grain
7 of salt with this? I'm not sure I could articulate that.

8 A. Because she is assessing his -- her opinion is that he was
9 deficient in his knowledge of general obstetrics and
10 gynecology, which is completely distinct from REI, and the fact
11 that he had passed his general boards says that he had an
12 adequate fund of knowledge and defended that fund of knowledge
13 and ability to synthesize plans and problems in general
14 obstetrics and gynecology to the satisfaction of the national
15 examiners.

16 Q. Okay. So I understand that, the general OB/GYN, but you
17 go on to do a fellowship and work in a subspecialty. REI is a
18 subspecialty, is it not?

19 A. Yes.

20 Q. Okay. So that is knowledge beyond general OB/GYN, what
21 you were just describing?

22 A. So I'm not disputing that. What I'm disputing is the
23 general idea that he's unable to synthesize general facts.

24 Q. She goes on on Page 7, "B, preoperative planning and
25 assessment". She talks about that. Page 8, she talks about

1 professionalism. Did you take anything that she wrote under
2 "Professionalism" seriously, or did you take that with a grain
3 of salt?

4 A. So we had actually been in, in the areas of
5 professionalism, we had been working on his timely completion
6 of medical records. That had been an ongoing --

7 Q. He was always behind in his charts, and that was a
8 problem, wasn't it?

9 A. That was a not, an uncommon problem for many of the
10 faculty members. He was not out of range of what, of other
11 faculty members, but it was a consistent problem for Dr. Hsu.

12 Q. He was often on the list that said his chart, he was
13 behind in his charts; is that correct?

14 A. Among many other providers.

15 Q. Got it. And that's a problem for billing, isn't it?

16 A. In a very broad sense, because bills are not generated as
17 soon as a, as a note is completed.

18 Q. How about a problem of team communication? Is it a bigger
19 problem in a division where women are coming in routinely and,
20 when you call up that woman's chart and it hasn't had the last
21 entry by Dr. Hsu that's a problem, is that an issue, a
22 communication issue?

23 A. I think that was a problem with the, with the division in
24 general, that there was very poor communication among team
25 members, because not, because not always, that the plans were

1 not always documented actually in a note.

2 Q. Was Dr. Porter behind on her charts regularly?

3 A. She's actually very good at her charting.

4 Q. Thank you. Okay. I'd like you to turn to 9, Page 9,
5 where she goes over his technical skills. Okay. "I have
6 addressed some of the issues with his fundamental deficits in
7 IVF ART, but it cannot be overstated that my observation is he
8 has trouble integrating the technical skills that he has been
9 sufficiently taught."

10 The next paragraph says, "Most relevant to our practice,
11 he has regressed considerably in his ability to perform embryo
12 transfers."

13 So my understanding -- please correct me if I'm wrong --
14 is IVF is egg harvest and then embryo transfer. Is that a
15 basic understanding?

16 A. Yes.

17 Q. Thank you. And this was written in June of 2016; is that
18 correct?

19 A. Yes.

20 Q. And Albert Hsu had been in the practice for 2014, 2015,
21 and 2016, to June of 2016; is that correct?

22 A. Yes, under Misty's guidance.

23 Q. Except when she was out on disability?

24 A. Which was primarily 2016.

25 Q. Okay. When you received notice from Misty that he had

1 regressed considerably in his ability to perform embryo
2 transfer, that's a pretty basic skill for an REI specialist,
3 isn't it?

4 A. Yes.

5 Q. Okay. So you have been put on notice that you have a
6 doctor that has problems with women who are coming to the
7 clinic to become pregnant and he has performance problems?

8 A. This is, also, this is a provider who has been under
9 Dr. Porter's tutelage for 2014 and 2015 and, if she identified
10 that he has regressed in his skills, there needs to be some
11 sort of remediation that, if she's unable to do it, then it's
12 another senior member who is able to provide that remediation.

13 Q. Okay. So you're not saying that his regression is Misty's
14 fault? That's not what you're saying?

15 A. Absolutely not.

16 Q. Okay.

17 A. But, if that were the case, if there was regression in
18 technique, then there needs to be remediation to get back to an
19 appropriate technique.

20 Q. And who was responsible for putting that plan in place?

21 A. That would have been Dr. Seifer coming in.

22 Q. Okay. We'll get to Dr. Seifer, but did you, as chair,
23 have an obligation, given that Dr. Seifer had just arrived and
24 Misty Porter was back from disability, did you have an
25 obligation to do something with a report like this?

1 A. I think my obligation is to make sure that there is a
2 remediation plan in place for Dr. Hsu.

3 Q. Did you put one in place in June of --

4 A. That's not my --

5 Q. -- June of 2017?

6 A. That is not my role.

7 Q. Did you direct Dr. Seifer to put one in place in 2017, in
8 2016?

9 A. In 2016 that would have been his responsibility.

10 Q. Did he?

11 A. That would have been part of his responsibility. I don't
12 know what he, what the details, but I know one of his
13 responsibilities was to assess the performance of Dr. Hsu.

14 Q. What I'm hearing from you is it was not your
15 responsibility.

16 A. It was not my responsibility. I don't have the skills or
17 ability to put that remediation plan in place. This requires a
18 skilled physician in REI.

19 THE COURT: Ms. Nunan, it's time for our afternoon
20 break. So we'll return at 3:15.

21 (A recess was taken from 3:03 p.m. to. 3:16 p.m.)

22 THE COURT: Please go ahead.

23 BY ATTORNEY NUNAN:

24 Q. We established this letter was written in June of 2016,
25 correct?

1 A. Yes.

2 Q. And Dr. Albert Hsu was allowed to continue practicing with
3 no restrictions from this time until the division closed in May
4 of 2017; is that correct?

5 A. Yes.

6 Q. I'd like --

7 A. Because he --

8 Q. I'd like you to turn to Exhibit 28, please. Have you had
9 a chance to review it?

10 A. Yes. Trying to put it into context, yes.

11 Q. So this is an email thread that starts on December 3rd
12 2016 at the bottom of Page 1 and carries over into December 4th
13 2016 and then finally December 5th 2016, and the last one is
14 between you and Judith McBean; is that correct?

15 A. Yes.

16 Q. Okay. I would like to move Plaintiff's Exhibit 28.

17 THE COURT: Go ahead.

18 ATTORNEY NUNAN: Are we good?

19 THE COURT: Any objection?

20 ATTORNEY SCHROEDER: No objection, Your Honor.

21 THE COURT: Okay. Plaintiff's 28 is admitted.

22 (Plaintiff Exhibit 28 is admitted into evidence.)

23 BY ATTORNEY NUNAN:

24 Q. All right. So Dr. Porter writes to you on December 3rd
25 2016. She says, "There are two patients that I have discussed

1 with all you who had HyCoSy/SHGs to evaluate the cavity that
2 were read as septums. Neither patient has a septum. One
3 normal uterus, one arcuate, which is a considered a normal
4 variant."

5 Okay. So we are talking about uterus septi, is that
6 correct, or septum?

7 A. No.

8 Q. No?

9 A. Well, we're, we are, we're discussing uterine cavity shape
10 and uterine cavity normal versus abnormal.

11 Q. Thank you. Thank you. Do you remember receiving this
12 email and remember this issue?

13 A. In detail, no, not at all.

14 Q. Okay. So, if I was to say to you that Dr. Hsu had
15 assessed two patients to say that they had septums or abnormal
16 septums that needed maybe surgical repair, is that close to
17 being the case here?

18 A. I don't know that Dr. Hsu read these.

19 Q. Okay.

20 A. And, also, that the, the ultrasounds were not performed
21 properly.

22 Q. Oh. So this could be an ultrasound tech's fault, not
23 Albert Hsu's fault?

24 A. Correct.

25 Q. Got it. All right. I would like you to come up to the

1 top where you write back where you say, "I had a pointed
2 discussion with Albert yesterday on two issues".

3 Does that refresh your recollection that this was an issue
4 about Albert?

5 A. No.

6 Q. It doesn't? Okay. You just responded to this about
7 Albert, nothing related? You don't think there is a connection
8 there?

9 A. I don't know.

10 Q. Okay. Thank you. I'm going to read what you wrote. You
11 have two points, and then down here you write, "I can't tell
12 him not to do it because I'm not the content expert, but I
13 would suggest Beth that you call her and suggest that she
14 postpone and see Judy or Misty, if Misty you believe the images
15 have been overread. I don't want her to be harmed. She works
16 here and should be able to pop in for another visit."

17 So my understanding of this email is that a woman was
18 scheduled for surgery who didn't need it. Is that your
19 understanding of this issue?

20 A. I don't know that for sure. One a patient appears to have
21 been scheduled for surgery for a metroplasty. There is, there
22 is discordance or a difference in how the ultrasound images
23 were read. I don't know whether Dr. Hsu read these images or
24 was present when these ultrasounds were done. Albert had --
25 Dr. Hsu, excuse me. Dr. Hsu had had a habit of, if he were

1 called in to look at an ultrasound, if he were reading
2 ultrasounds or called in to see a patient, that he would
3 convert that to a formal consultation, which we had discouraged
4 him. That, we had told him that that is not proper practice
5 that, if the patient needed to be seen by him, that that
6 patient should be scheduled for a separate appointment.

7 Q. So right. That's a maybe a billing or a -- that's, that
8 is a separate issue. I get that. That's point one. But point
9 two, you have a patient who he was going to do surgery on who
10 didn't need it, and you state, "I don't want her to be harmed";
11 is that correct?

12 A. So what I am being told is that a patient who had a, who
13 was diagnosed as having a septum, which is a uterine, an
14 intrauterine abnormality, was scheduled to have that corrected.
15 I don't know -- and then I was informed by Misty that these
16 ultrasounds were not performed correctly and that this perhaps
17 was not the correct interpretation because of the, the
18 ultrasounds not being performed correctly.

19 The part about harm, absolutely, you never want to have a
20 patient undergoing a surgical procedure, any procedure, any
21 visit that is not necessary. Part of what is required before
22 you take a patient to the operating room is a preoperative
23 consultation and that you bring that patient in for the
24 appropriate counseling of what the problem is, what the options
25 are for treating that problem, what the implications are for

1 not treating the problem, or what the implications are for
2 treating it. So you give them a full idea of what is truly the
3 medical issue, how to fix it if it requires fixing, and what
4 are the risks to fix it?

5 Q. Thank you, Dr. DeMars. I appreciate that. Will you read
6 the top line that you wrote about your conversation with
7 Albert?

8 A. That goes back to --

9 Q. I'd like you to read it, please.

10 A. Yes. Sorry. I didn't hear you.

11 Q. That's okay. Could you please --

12 A. Yes.

13 Q. -- read the top line that I have highlighted? Please
14 excuse --

15 A. "The most unfortunate part of my conversation with Albert
16 is it became clear that, even if he passes his written exam, he
17 would not pass the oral exam." So the oral exam is when you
18 sit before, again, national experts to discuss --

19 THE COURT: So, Dr. DeMars, I'm going to direct you
20 to only answer a question that has been asked.

21 THE WITNESS: Sorry.

22 BY ATTORNEY NUNAN:

23 Q. Thank you. So this email, this last email was with Judith
24 McBean. Can you tell me who Judith McBean was?

25 A. Judith McBean is a colleague of ours who had completed an

1 REI fellowship at UVM at about the same time that Dr. Porter
2 did and was, had an OB/GYN practice in Brattleboro, and she
3 would refer her infertility patients up to DH for their
4 procedures.

5 Q. She also worked per diem since 2005 to 2017 in the REI
6 division; isn't that correct?

7 A. Per diem is -- she worked on a very limited basis.

8 Q. I appreciate you saying that, but she was in the
9 department, and she was included on REI division emails as part
10 of the department; isn't that correct? Do you know?

11 A. I don't know.

12 Q. Thank you. My understanding -- correct me if I'm wrong --
13 is that Dr. McBean would come up on Fridays and, because REI
14 was a seven-day-a-week operation, she would cover the weekends
15 sometimes, not always, but sometimes. Does that sound correct
16 to you?

17 ATTORNEY SCHROEDER: Objection, Your Honor.

18 THE COURT: Okay. Basis?

19 ATTORNEY SCHROEDER: Foundation. Assumes facts not
20 in evidence.

21 THE COURT: Yeah. You should ask a question instead
22 of a narrative leading into a question.

23 BY ATTORNEY NUNAN:

24 Q. Sure. This issue of uterine septum, septi -- I'm probably
25 not --you smiled. I'm probably not pronouncing that correctly.

1 Do you recall a conversation with Judith McBean about a uterus
2 septum surgery that Albert Hsu had performed on one of her
3 Brattleboro patients?

4 A. No.

5 Q. You don't remember her --

6 A. No.

7 Q. -- coming to you?

8 A. No.

9 Q. Not at all?

10 A. No.

11 Q. Okay. You do not remember her saying that the patient had
12 believed she'd had her septum removed by Dr. Hsu?

13 A. I do not remember a conversation whatsoever.

14 Q. Did you have an email exchange with her?

15 A. I do not remember this.

16 Q. Do you remember her stating that she'd gone in and done a
17 second surgery to remove the septum that the patient thought
18 she'd had removed by Albert Hsu?

19 A. Do not remember that.

20 Q. I'd like you to turn to document -- just confirm this --
21 148, please. I believe it's up top because it was in the
22 second notebook. Great. That last exhibit we looked at was
23 Exhibit 28 was written on 12/5/2016. That was exactly six
24 months after you'd written, you'd received an eleven-page
25 assessment from Dr. Porter about Dr. Hsu, right? That was six

1 months later?

2 A. Yes.

3 Q. This is an email thread that starts on January 29th 2017
4 and goes until February 19th 2017. This top email is from
5 Misty Porter to you. Do you recognize this email?

6 A. Yes.

7 ATTORNEY NUNAN: I'd like to move Plaintiff's Exhibit
8 148 into evidence.

9 THE COURT: Any objection?

10 ATTORNEY SCHROEDER: No objection.

11 THE COURT: Plaintiff's 148 is admitted.

12 (Plaintiff Exhibit 148 is admitted into evidence.)

13 BY ATTORNEY NUNAN:

14 Q. I'd like you to turn to the last page where there is a
15 chart, please.

16 A. Yes.

17 Q. Okay, great. My understanding is FET on the top left-hand
18 side stands for frozen embryo transfer; is that correct?

19 A. Yes.

20 Q. And on the right-hand side "fresh" means not frozen?

21 A. Correct.

22 Q. Great. Got that right. Was this sent by Navid
23 Esfandiari?

24 A. This was sent by Dr. Porter.

25 Q. Okay. The way I read it just above the chart it says on

1 January 29th 2017, 2:12 p.m., Navid Esfandiari wrote. So the
2 original document looks like -- the chart looks like it was
3 from Navid.

4 A. Correct.

5 Q. Who is Navid; can you tell us?

6 A. Navid Esfandiari was our IVF lab director.

7 Q. He was an embryologist as well?

8 A. Yes.

9 Q. Okay. Did he track all the statistics in a program called
10 Baby Sentry?

11 A. I don't know that they were in Baby Sentry.

12 Q. Okay. On this chart MB stands for Misty Blanchette?

13 A. Yes.

14 Q. DS stands for David Seifer?

15 A. Yes.

16 Q. AH, Albert Hsu?

17 A. Yes.

18 Q. And JMB, Judy McBean?

19 A. Yes.

20 Q. And I'm just going to highlight the numbers for Albert Hsu
21 here. I think I am. Do we agree that the percentages as you
22 go across are 28 percent, 28 percent, over under "Fresh", 21
23 percent, and 19 percent?

24 A. Yes.

25 Q. And on the right-hand side where it says 19 percent, the

1 numbers above it are 78, excuse me, 58 percent, 57 percent, and
2 57 percent for the other three providers?

3 A. Yes.

4 Q. Okay. I'd like you to move to the bottom of Page 3.
5 Dr. Porter writes to you, "Leslie, pregnancy rates from 2016.
6 Albert has a very low rate and a lot of biochemical pregnancies
7 suggesting traumatic, slash, poor technique. Albert's
8 pregnancy rates are not going up. David has been aware of the
9 trend, and I've spoken to David about this issue. It is unfair
10 to patients to allow Albert to continue to transfer."

11 Did you know how many of the REI IVF patients were paying
12 out-of-pocket?

13 A. No.

14 Q. No idea?

15 A. No idea.

16 Q. If I said 50 to 60 percent of the women were paying
17 out-of-pocket, would you disagree with that?

18 A. I have no basis to agree or disagree.

19 Q. Were you aware that people were paying out-of-pocket, a
20 large percentage were paying out-of-pocket?

21 ATTORNEY SCHROEDER: Objection.

22 THE COURT: Okay. Basis?

23 ATTORNEY SCHROEDER: Foundation.

24 ATTORNEY NUNAN: I didn't hear him. I'm sorry.

25 THE COURT: Foundation.

1 ATTORNEY NUNAN: Foundation? I'm trying to get to
2 the basis of why it's unfair to the patients.

3 THE COURT: Overruled. I'll let you ask the
4 question.

5 ATTORNEY NUNAN: Okay.

6 THE WITNESS: I'm sorry.

7 BY ATTORNEY NUNAN:

8 Q. So you can answer the question. Could you read back my
9 question?

10 (Question read by the reporter.)

11 A. So I didn't, I don't know what the percentage of patients
12 who were paying out-of-pocket. New Hampshire does not have
13 favorable infertility laws requiring insurance coverage. So it
14 may be that patients truly were paying out-of-pocket if they
15 weren't working for a family-friendly company.

16 Q. Okay. You respond to Dr. Porter above on February 18th.
17 You state, "It's worth looking at the month-to-month trend. I
18 know that the FET rate January to June was horrible,
19 attributable to both technique and poor embryos per Navid".
20 We're talking about 2016 here, right?

21 A. Yes.

22 Q. And you know that his rates from January to June were
23 horrible?

24 A. Yes, attributable to primarily poor embryos.

25 Q. Well, it says both technique and poor embryos. So do you

1 have an understanding of how embryos can become poor if they're
2 poorly harvested?

3 A. I would not even try to answer that question. Embryos are
4 poor based on their, their many other things other than their
5 harvest.

6 Q. On Page 2 Dr. Porter writes back to you. I'm going to go
7 -- if you can see on the screen, I want to make sure you're
8 following me, the part I've highlighted. "The fresh PR" -- PR
9 stands for pregnancy rates?

10 A. Yes.

11 Q. "The fresh PR numbers say it all. Navid and the nurses
12 have been aware of his PR and have expressed repeated concerns
13 about Albert. I have had comments from patients about pain
14 during the transfers when Albert does the transfers. If the
15 uterus contracts, rates go down. He knows this. I have
16 reviewed teaching slides with him and counseled him. The same
17 quality fresh embryos have been given to all of us. Albert did
18 a lot of fresh cycles, ETs. He is one-third PR as compared to
19 the rest of us. It's not new."

20 So this is February of 2017, and you are getting, yet
21 again, reports about Albert Hsu. How concerned are you about
22 this?

23 A. So I think, once again, this is -- there are many reasons
24 why pregnancy rates can be low. Dr. Esfandiari was a fantastic
25 embryologist, so I think he tried to give the best quality

1 embryos that he could have, but women have different quality
2 embryos, that women, that pregnancy rates differ depending on
3 the age of the, the age of the oocytes, the age of the eggs.
4 There are many things that call into what a pregnancy rate is
5 going to be and to attribute it only to transfer technique is
6 an unfair characterization.

7 Q. You're in a position to assess that over Dr. Porter?

8 ATTORNEY SCHROEDER: Objection, Your Honor.

9 THE COURT: Overruled.

10 THE WITNESS: What I'm saying is that that is an
11 unfair characterization because she also knows that there are
12 many factors that come into poor pregnancy rates other than
13 transfer technique.

14 BY ATTORNEY NUNAN:

15 Q. Let me try it this way. What would you have had to hear
16 from someone that would have made you pull Albert Hsu from
17 treating patients?

18 A. This entire time I was trying to find someone who would be
19 able to provide experienced supervision of Dr. Hsu and an
20 unbiased assessment of Dr. Hsu.

21 Q. That's not quite what I was asking.

22 A. That's what it would require, someone who is unbiased,
23 skilled, and understood the complete picture of pregnancy
24 rates, infertility, IVF.

25 Q. So you could not take that from Dr. Porter?

1 A. I was unwilling to take that as written from Dr. Porter.
2 Remember, Dr. Porter spent decades cutting down members of her
3 division.

4 Q. Let's talk about Dr. Porter's behavior since you bring
5 that up. This is, what, the second time you've brought up her
6 behavior, alleged behavior?

7 A. Her behavior, yes.

8 Q. Okay. I heard you use the word "splitting" before.

9 A. Yes.

10 Q. Okay. So did you ever have a doctor while you were chair
11 that had behavior problems that was not Dr. Porter?

12 A. Yes.

13 Q. Okay. So talk to me about the process, the DH policies
14 that you followed when you went, when you had a doctor that had
15 behavior problems.

16 A. We actually had a process in place by which there was a
17 graduated correction plan in that, if there was a complaint or
18 problem that was identified, you would immediately have a
19 discussion with the provider that, that had the complaint
20 against them. And it was done in a nonjudgmental way as a,
21 This was raised. Can you review this incident in your mind and
22 see where, where the basis of this complaint could lie? And we
23 expect that whatever that behavior was would not continue.

24 Q. Perfect. I would like to talk about one of your partners
25 in the urogyn department that had just this behavior. Her

1 initials are EF. I would prefer not to say her -- do you know
2 that surgeon that had a problem?

3 ATTORNEY SCHROEDER: Objection, Your Honor. May we
4 approach?

5 THE COURT: Yes.

6 (Bench conference begins.)

7 ATTORNEY SCHROEDER: I've got a series of objections.
8 The first one of which is I have no idea what she's asking
9 about. She's going to ask a question and hope that Dr. DeMars
10 knows who she's talking about, yet I have no idea who she's
11 talking about. There's no foundation. Assumes facts not in
12 evidence. There is no -- I don't even know what we're even
13 talking about.

14 ATTORNEY NUNAN: Sure. I'm happy to explain. So I
15 am aware of a situation in the OB/GYN department that
16 Dr. DeMars dealt with properly when there was a behavior issue.
17 She had a surgeon. She counseled her on her behavior. She put
18 her on a pit plan. She had Dr. Porter counsel her. Then she
19 sent her to Acumen. The behavior did not stop. She knows the
20 proper process in which a doctor with a behavior problem should
21 be handled, and this is where I'm headed with this which is,
22 every time I turn around, I hear her say there's a behavior
23 problem with Dr. Porter, and, as far as I know --

24 I'm interested. She's, believe me, I bet we're going hear
25 more, Every time I turn around I hear -- and I should keep my

1 voice down. Excuse me. I believe that I have a right to show
2 that she knows the process and that Dr. Porter was not afforded
3 that due process, that this was an excuse. I hope I've done a
4 good job explaining that.

5 ATTORNEY SCHROEDER: I don't know. I think she, at
6 one point, was testifying for Dr. DeMars as to how many times
7 she complained about her behavior. She certainly has the right
8 to ask her about all these questions, but to say that there's
9 this unknown person X --

10 ATTORNEY NUNAN: Would you like me to use her name?
11 I would prefer not to. I don't think that's fair.

12 ATTORNEY SCHROEDER: But I don't know. I don't know
13 who we're talking about. So I don't even --

14 ATTORNEY NUNAN: Evelyn Fleming, who was terminated
15 from the urogyn department.

16 ATTORNEY SCHROEDER: Okay. You can use maybe her
17 initials.

18 ATTORNEY NUNAN: I just did.

19 ATTORNEY SCHROEDER: I didn't hear you.

20 ATTORNEY NUNAN: That's what I thought I said. Maybe
21 I wasn't clear. I used her initials. I'm trying to be super
22 respectful here, but I do think that that is a major point I'd
23 like to make with her because that notion that this is a
24 behavior problem, I'm not buying it.

25 ATTORNEY SCHROEDER: Hold on. You have every right

1 to cross-examine her, but you can't then say you've said it
2 twice in the course of two hours of testimony. So, if she said
3 it twice, fine, but characterizing her testimony, that's fine.
4 You have the right to ask that. If you're going to go by
5 initials, I have no problem with that. I just wanted to
6 understand.

7 THE COURT: Ask questions, okay? There tends to be a
8 little bit of kind of narrative, and please don't take this as
9 a criticism, but you want to really stay focused, and I know
10 you're trying to pivot from topic to topic. You really, you
11 can have a little bit of leeway there, but you should be asking
12 questions instead of saying, My understanding, and kind of a
13 narrative and then asking for that to be informed.

14 ATTORNEY NUNAN: Okay. I will take that. I
15 appreciate that. I do feel like her talking early on, I think
16 the jury watching her come up with these excuses is not --

17 THE COURT: I understand your opinion, but in terms
18 of the Rule of Evidence --

19 ATTORNEY NUNAN: Sure, I will ask questions.

20 ATTORNEY SCHROEDER: My early issue, Your Honor, was
21 just make sure -- and it's hard to do because I've had this
22 issue too -- just making sure she lets her finish her answer.
23 She has what I would call a pregnant pause in her, just how she
24 talks. She just does and so --

25 THE COURT: The Witness? No pun intended.

1 ATTORNEY SCHROEDER: Yeah. No. This is, like, just
2 how she talks. So what? No pun intended, exactly.

3 THE COURT: Yeah. So just make sure. There is a
4 kind of long, pregnant pause at the end of the first part of
5 the answer, and then she starts.

6 ATTORNEY SCHROEDER: I understand that.

7 ATTORNEY NUNAN: I should be jumping in and
8 controlling it more.

9 ATTORNEY SCHROEDER: I'm not going to talk to the
10 Witness afterwards other than to say which I've said before,
11 just, once you starts your answer, just let you finish your
12 answer, and we need to move along.

13 THE COURT: So it sounds like the objection is, not
14 so much that she's going to ask about this, but that she used
15 initials, which she can.

16 ATTORNEY SCHROEDER: Well, now at least I understand
17 who she's talking about because I would have had no context.
18 There's no context. So I understand the context. So I think
19 we can proceed with the initials. Thank you.

20 THE COURT: Objection overruled.

21 ATTORNEY SCHROEDER: Thank you.

22 (Bench conference ends.)

23 BY ATTORNEY NUNAN:

24 Q. Dr. DeMars, you had a physician within the urogyn division
25 who was a surgeon whose initials were EF. Do you know who I'm

1 talking about?

2 A. Within urogyn?

3 Q. I believe so. Am I wrong? Do you know somebody who is
4 just in OB/GYN?

5 A. I know another physician who was not in urogyn that we --

6 Q. Okay. And did this physician have trouble in the OR with
7 the staff?

8 A. Yes.

9 Q. Okay. And this is a situation, a behavior issue that you
10 dealt with?

11 A. Yes.

12 Q. Okay. So did you speak to this physician about her
13 behavior pointedly?

14 A. Yes.

15 Q. Did you ask Dr. Porter to counsel her four times?

16 A. I may have. I don't know.

17 Q. Did you put this physician on a performance improvement
18 plan?

19 A. I don't think we got that far.

20 Q. Okay. Did this physician go to bad doctor school, for the
21 lack of another word, Acumen? There's schools that help with
22 behavior issues?

23 A. Not during that time. I think, ultimately, she may have,
24 but not during the time I was with her.

25 Q. Okay. So there are regulated ways or that you deal with

1 physicians with behaviors; is that correct?

2 A. Yes.

3 Q. Okay. If Dr. Porter's supposed behavior problems that
4 you've referenced rose to such a problematic level as you
5 claim, why wasn't she given an opportunity to address those
6 problems like you did with this other physician?

7 A. That goes back to the conversation that I had with
8 Dr. Manganiello that I had --

9 Q. In 2009?

10 A. No, I had that conversation in 2014 after he had retired.
11 Because I --

12 Q. And that conversation somehow overrid Dr. Porter's ability
13 to understand that you thought she had a behavior problem?

14 A. Say that again.

15 Q. Sure. I'm sorry it wasn't clear. So, Dr. Porter, if you
16 thought she had a behavior problem, had a right to understand
17 what you thought that problem was, right?

18 A. This was probably one of the biggest mistakes that I made.

19 Q. You didn't tell Dr. Porter that you thought she had a
20 behavior problem?

21 A. Correct.

22 Q. You did not give her an opportunity to address or fix that
23 behavior problem?

24 A. I was, I was unwilling in 2014 to address that
25 immediately.

1 Q. How about in 2015?

2 A. In 2015 there weren't -- the beginning of 2015, I would
3 say, in 2015 the -- no, I didn't. I would say that that was
4 probably one of the biggest mistakes that I made was not to
5 address the behavior problems that were occurring at the time.

6 Q. If they were occurring at all?

7 A. They were occurring. They were occurring, that there was
8 team Hsu, and there was team Porter within the general, within
9 the REI division. That was part of the general behavior of
10 creating sides and creating disharmony among the division.

11 Q. Okay. I'd like to move on to Exhibit 52, please. To the
12 best of your knowledge, Dr. Porter was never on a performance
13 improvement plan, correct?

14 A. That's correct.

15 Q. Okay. This email is from you to Daniel Herrick, correct?

16 A. Yes.

17 Q. Who is Daniel Herrick?

18 A. Daniel Herrick was the sort of the operations manager for
19 the department of obstetrics and gynecology and also for
20 anesthesia.

21 Q. Okay. And this email was written on April 25th 2017,
22 correct?

23 A. Yes.

24 ATTORNEY NUNAN: I'd like to move the admission of
25 52, Plaintiff's 52, into evidence, please.

1 THE COURT: Any objection?

2 ATTORNEY SCHROEDER: No objection, Your Honor.

3 THE COURT: Plaintiff's 52 is admitted.

4 (Plaintiff Exhibit 52 is admitted into evidence.)

5 BY ATTORNEY NUNAN:

6 Q. In April, by April 25th 2017 had the decision been made to
7 close the REI division?

8 A. No.

9 Q. What date would you put to that decision?

10 A. I would put it later in April.

11 Q. You write to Daniel Herrick, "Ed is also lumping Albert
12 into, quote, 'he's been a problem since day one', end quote.
13 This is not a fair characterization of Albert. Again, Misty
14 has decided that she no longer wants to work with him or teach
15 him and she's bullying him. He did an amazing job by himself
16 January to August of 2016."

17 Is that a correct statement, that he did an amazing job by
18 himself from August, from January to August of 2016?

19 A. This is a very frustrated email. Dr. Hsu, who we knew had
20 limitations, was by himself from January essentially to August
21 of 2016, and he was overworked, overstressed, and was trying to
22 do the job of two people when he couldn't actually do the job
23 thoughtfully. And I -- did he do an amazing job? It was
24 incredibly hard to watch him trying to work during that time.

25 Q. Okay. I'd like to direct your attention back to what you

1 wrote two months earlier which is, "I know that the FET rate
2 January to June was horrible", correct?

3 A. Yes, frozen.

4 Q. Frozen? That's fine. From a patient standpoint, did you
5 have an obligation to keep Albert from trying when he was
6 failing to do these embryo transfers?

7 ATTORNEY SCHROEDER: Objection, Your Honor.

8 THE COURT: Basis?

9 ATTORNEY SCHROEDER: I think she's mischaracterizing
10 Dr. DeMars's prior testimony and also mischaracterizing, I
11 think, the actual statement that she's referring to.

12 THE COURT: Overruled.

13 THE WITNESS: Ask the question again, please.

14 (Question read by the reporter.)

15 THE WITNESS: I think that to characterize that
16 embryo transfers were the reason for poor pregnancy rates is a
17 gross oversimplification, and I would disagree with that
18 statement.

19 BY ATTORNEY NUNAN:

20 Q. Two lines later you state, "Despite the dysfunction, the
21 pregnancy rates were excellent". Is that true?

22 A. Yes. They went up in 2016.

23 Q. Why did they go up in 2016?

24 A. Because of Dr. Esfandiari.

25 Q. So what I'm noticing here is that what you say to

1 Dr. Porter and what you say to top administration officials is
2 different; is that correct?

3 ATTORNEY SCHROEDER: Objection, Your Honor.

4 THE COURT: Sustained.

5 ATTORNEY NUNAN: Okay. I would like to turn to a
6 document that I believe is already admitted. Can we check?
7 Defendant's Exhibit W.

8 THE COURT: That is admitted.

9 ATTORNEY NUNAN: Okay. I'm not sure that you have a
10 paper. Do you have a paper copy? I don't think you do, so I'm
11 going to have you read it on the screen. I apologize for that.
12 If you guys have a paper copy for her, I would appreciate it.

13 ATTORNEY SCHROEDER: Give me one second, and we'll --

14 ATTORNEY NUNAN: Sure.

15 ATTORNEY SCHROEDER: I think it's Volume 1. There's
16 a notebook up there, I think.

17 ATTORNEY NUNAN: Okay. If you would like a paper
18 copy, there is a Volume 1 of defendant's, and that should have
19 a W under it. Sorry.

20 THE WITNESS: It's empty.

21 ATTORNEY NUNAN: Okay.

22 ATTORNEY SCHROEDER: We've got a copy to hand up if
23 you'd like.

24 ATTORNEY NUNAN: Okay, great. I'm actually going to
25 switch gears on you. I apologize. Is Exhibit 7 admitted?

1 THE COURT: No.

2 ATTORNEY NUNAN: Okay. Will you please look at
3 Plaintiff's Exhibit 7?

4 THE COURT: Correction. The Deputy Clerk tells me it
5 is admitted in evidence.

6 BY ATTORNEY NUNAN:

7 Q. Okay, thank you. I'd like to switch now to David Seifer.
8 If you could please read Exhibit 7, that would be great. Set
9 this here for the future. Okay. We've looked over this
10 document already today, right?

11 A. Yes.

12 Q. Okay. In March of 2016, the credentialing committee
13 received a negative report about David Seifer, correct?

14 A. Yes.

15 Q. Dr. Amato had written a negative evaluation?

16 A. He had, yes.

17 Q. You asked the credentialing committee that the requirement
18 of current letters of recommendation be waived because Dr.
19 Seifer could not provide them, right?

20 A. I don't know. I may have.

21 Q. Did you go in front of the credentialing committee and
22 state that you wanted to hire David Seifer?

23 A. Yes.

24 Q. Okay. Is it fair to say that the credentialing committee
25 had concerns about Dr. Seifer?

1 A. Yes.

2 Q. Who was on the credentialing committee at the time?

3 A. I don't remember.

4 Q. Was Dr. Maria Padin?

5 A. I don't, I don't remember for sure.

6 Q. Do you remember?

7 A. Probably. She was, she was chief of the medical staff.

8 Q. Do you remember Jocelyn Chertoff being on there?

9 A. I don't remember.

10 Q. Do you remember Dr. Ed Merrens being on the credentialing

11 committee?

12 A. No, I don't. Honestly, I don't remember. That was a

13 while ago.

14 Q. Okay. Do you remember what the credentialing committee

15 told you about David Seifer's hire?

16 A. No.

17 Q. Okay. Do you remember Dr. Ed Merrens saying to you that

18 David Seifer's success, quote, "was on you"?

19 A. Yes.

20 Q. He made that statement?

21 A. I'll say "yes".

22 Q. Okay. In fact, you, you, in the past, have described that

23 as the charge you were given? Does that ring a bell?

24 A. No.

25 Q. Okay. I'm going to read from your deposition. Do I mark

1 this as ID3? I believe.

2 THE COURT: You should mark it, yes.

3 ATTORNEY NUNAN: This is the deposition transcript of
4 Leslie DeMars.

5 BY ATTORNEY NUNAN:

6 Q. You were asked, "Did you appear before the credentialing
7 committee to explain your rationale for Dartmouth-Hitchcock to
8 hire Dr. Seifer?" Your answer was, "Yes, I went before the
9 committee because, at that point, we had one physician in the
10 division. We had Dr. Hsu who could not continue working at the
11 pace he was working, nor was it appropriate for him as a junior
12 provider to continue to try to keep the division going. We had
13 had a search for several years for another REI provider, and
14 Dr. Seifer was the only candidate interested in coming to work
15 at Dartmouth."

16 You were then asked, "Did you represent to the committee
17 that you would take personal responsibility that Dr. Seifer
18 would be a success?" And you answered, "I was given that
19 charge". And the question was, "They told you that?" The
20 answer was, "Yes."

21 Do you remember that now?

22 A. Honestly, I don't remember that now, but that would have
23 been my responsibility if I went before the, the credentialing
24 committee. It was my responsibility for his hire.

25 Q. Is it a little unusual that his success is tied to your

1 success?

2 ATTORNEY SCHROEDER: Objection, Your Honor.

3 THE COURT: Sustained.

4 BY ATTORNEY NUNAN:

5 Q. We'll come back to that. When did Dr. Seifer start
6 working in an administrative capacity?

7 A. May or June of '16.

8 Q. And did he have to wait to see patients?

9 A. Yes.

10 Q. Okay. Why was that?

11 A. Because he wasn't licensed or credentialed as yet.

12 Q. And this was about the same time that Dr. Porter was
13 returning in a limited capacity?

14 A. In a very limited capacity.

15 Q. Okay. And did you ask Dr. Porter at that point to assess
16 Dr. Seifer's skills?

17 A. So part of the credentialing process is that a certain
18 number of specialty procedures have to be observed.

19 Q. Proctored?

20 A. Observed.

21 Q. And there's a form you fill out --

22 A. Yes.

23 Q. -- called an FPPE assignment form?

24 A. That may be the name of it, but, yes, there is a, there is
25 a formal process by which particular procedures need to be

1 observed.

2 Q. I would like to turn to W now if I can find it. Can you
3 please read W? Do you remember receiving this email?

4 A. Do I remember it? Specifically, no.

5 Q. Dr. Porter says here, "I watched retrievals this week. It
6 has either been some time since DS did retrievals regularly and
7 he is rusty, unfamiliar with the setup. He's been doing half
8 the cases with Albert. Technically, he is poor and/or some
9 combination of these. He has some fairly old concepts of
10 retrieval techniques, quote, 'you need to curette the
11 follicle'". Did I read that correctly?

12 A. Yes.

13 Q. Farther down she says, "I took the opportunity to pull him
14 aside Thursday and ask questions about his embryo transfer
15 preferences. He gave me a blank stare when I asked which
16 transfer technique he prefers".

17 So, when you received this email, do you remember being
18 worried or concerned?

19 A. I remember discussing it, discussing with Dr. Seifer.

20 Q. You had a discussion with Dr. Seifer?

21 A. Yes.

22 Q. Did you have a discussion with Dr. Porter about this?

23 A. No. I had a discussion with Dr. Seifer.

24 Q. Okay. I want to turn -- I'd like to look at Exhibit 11,
25 please. I do not think it's admitted. Okay?

1 A. Yes.

2 Q. Who -- so this is an email from Dennis Seguin to you; is
3 that correct?

4 A. Yes, Seguin.

5 Q. Thank you. July 28th 2016?

6 A. Yes.

7 ATTORNEY NUNAN: I'd like to move the for the
8 admission of Plaintiff's Exhibit 11.

9 THE COURT: Any objection?

10 ATTORNEY SCHROEDER: No objection.

11 THE COURT: Plaintiff's 11 is admitted.

12 (Plaintiff Exhibit 11 is admitted into evidence.)

13 BY ATTORNEY NUNAN:

14 Q. Tell me, who is Dennis?

15 A. Dennis was the head ultrasonography tech at DH.

16 Q. He writes here, "Misty and I spoke earlier today, and she
17 has asked m me to forward you some of the details about the
18 recent, about a recent embryo transfer performed by Dr. Seifer.
19 The details of my observation only regarding this procedure.
20 The embryo transfer did not go well. Dr. Seifer, while he
21 performed the procedure using sterile technique, his skill set
22 was somewhat alarming to me".

23 The ultrasound techs are in on all of these embryo
24 transfers, right?

25 A. Yes.

1 Q. He would have seen many, many?

2 A. I don't know.

3 Q. He was experienced?

4 A. I don't know how many he would have seen.

5 Q. Got it. Do you think he was an experienced ultrasound
6 tech?

7 A. He is an experienced ultrasound tech.

8 Q. Okay. He says farther down here, "While I am not an
9 expert, this was clearly not a well-performed embryo transfer.
10 I later learned that the patient was paying out-of-pocket for
11 the entire procedure. While this does not influence my message
12 to you, it does make me unhappy to see, quote, 'our patients
13 not receiving the best care'".

14 Were you concerned when you received this email?

15 A. I went and talked to Dennis.

16 Q. And what was the content of that conversation?

17 A. As I recall, Dennis recounted his experience with this
18 embryo transfer. He backtracked a bit on the details, but he
19 recalled essentially that he thought that this transfer was
20 not, not the same as what he would see if Dr. Porter or
21 Dr. McBean would do a transfer.

22 Q. Did you have reason to doubt his ability to say whether or
23 not this embryo transfer was not well-performed?

24 A. I think it goes back to what is, what is the level of,
25 what is excellent? What is good? What is acceptable? What is

1 unacceptable? And does, does Dennis have that ability to
2 judge? No, he does not.

3 Q. How do you know that?

4 A. Because he is not an REI physician.

5 Q. I would like you to look at Exhibit Number 9. Is this a
6 text message exchange with Richard Reindollar and yourself?

7 A. Yes, it is.

8 Q. On Thursday July 28th 2016?

9 A. Yes.

10 ATTORNEY NUNAN: I'd like to move for the admission
11 of Plaintiff's Exhibit 9.

12 THE COURT: Any objection?

13 ATTORNEY SCHROEDER: No objection, Your Honor.

14 THE COURT: Plaintiff's Exhibit 9 is admitted.

15 (Plaintiff Exhibit 9 is admitted into evidence.)

16 BY ATTORNEY NUNAN:

17 Q. The highlighting is mine. You write, "Richard, I am not
18 sure that DS is clinically competent. I don't know what he's
19 been doing for 25 years, but I'm not sure it was IVF". Then
20 you write further down, "I am trying really hard, because I
21 spoke to many people who were highly supportive, and I am
22 always relentlessly optimistic. I have heard separately voiced
23 concerns from nursing, anesthesia, and ultrasound techs. The
24 lab folks complain about bloody aspirates and low egg counts.
25 I haven't talked to Navid to get true data because Navid is on

1 vacation. He is scared to death of OHSS and has very slow
2 induction regiments".

3 Please turn to the next page. You write, "I'm venting and
4 I really want to help him be successful". This is a private
5 text message with Richard Reindollar, right?

6 A. Yes, it is.

7 Q. And what you describe here is a little inconsistent with
8 the conversation you had with Dennis Seguin, isn't it?

9 A. This actually happened right after my conversation with
10 Dennis.

11 Q. Because the date of Dennis's exhibit is also the 28th?

12 A. Yes.

13 Q. Great. Okay. So you had a conversation with Dennis, and
14 then you went and wrote this email?

15 A. Because I'm trying to get independent, some sort of
16 independent assessment or -- I am not the medical expert for
17 competence for REI physicians. I am trying to get some idea of
18 how I can determine from an independent assessor whether our
19 physicians are competent.

20 ATTORNEY NUNAN: Give me just a second, please.

21 THE COURT: Yes.

22 BY ATTORNEY NUNAN:

23 Q. I'll return to that. So this is July 28th of 2016, and,
24 as chair of the OB/GYN department, at this point, you had
25 notice that David Seifer was not clinically competent, your

1 words, and you had notice a month or two months earlier from
2 Dr. Porter that there were significant problems with Albert
3 Hsu. So you were on notice that you had two physicians in the
4 REI division the summer of 2016 that were problematic, right?

5 A. The summer of 2016 was right when Dr. Seifer started.

6 Q. How long was Dr. Seifer at his former employment, do you
7 know?

8 A. A couple of years.

9 Q. In Washington?

10 A. Oregon.

11 Q. Oregon?

12 A. I think Oregon.

13 Q. How long was he in Oregon?

14 A. Couple of years.

15 Q. He was not there for a matter of months before they pulled
16 his credentials?

17 A. I don't believe so.

18 ATTORNEY SCHROEDER: Objection, Your Honor.

19 THE COURT: Basis?

20 ATTORNEY SCHROEDER: Foundation.

21 THE COURT: Overruled.

22 BY ATTORNEY NUNAN:

23 Q. So the complaints during the credentialing process that
24 you heard, what was your understanding of what had happened in
25 Oregon?

1 A. My understanding was that Dr. Seifer was hired in Oregon
2 to be the division director in Oregon and that there were,
3 there was a physician who was the division director there who
4 was retiring and he was brought in to be the new division
5 director. The three remaining providers there, one of them
6 wanted to be the division director, and the three of them
7 essentially rejected that David was going to be their division
8 director.

9 Q. Is that what the evaluation you heard from Dr. Amato
10 stated?

11 A. So Dr. Amato, he was the physician who wanted to be the
12 division director, and that was inconsistent with what I had
13 heard from both the lab director as well as the chair of the
14 department.

15 Q. And the reports you're hearing at this time in late July,
16 Dr. Porter, Dennis, your reporting it to Richard Reindollar,
17 aren't those reports consistent with the same thing you were
18 hearing out of Oregon that you had to go in front of the
19 credentialing committee about?

20 A. No.

21 Q. They were different?

22 A. No.

23 THE COURT: So, Ms. Nunan, it's 4:30. Is this an
24 okay time?

25 ATTORNEY NUNAN: This is a great place to stop.

1 Thank you.

2 THE COURT: All right. Thank you. Okay. So we'll
3 break for the day. See you tomorrow at 9:00 o'clock. Please
4 don't speak to anyone about the case or do any independent
5 research on the case yourselves. Thank you.

6 (The Jury leaves the courtroom.)

7 THE COURT: Thank you. Okay. So, just generally on
8 the topic of scheduling, so Dr. DeMars is still on the stand,
9 and I believe there is -- is it Dr. Russell that you had said?

10 ATTORNEY NUNAN: Dr. Russell, yes.

11 THE COURT: Dr. Russell, Dr. Conroy. Any other plans
12 for tomorrow on plaintiff's?

13 ATTORNEY NUNAN: I doubt we'll get to Ira Bernstein,
14 but we have him on as well. We've asked him to be available
15 for the afternoon.

16 THE COURT: Okay. And how many witnesses do you
17 anticipate after those four?

18 ATTORNEY NUNAN: Just Dr. Merrens, and then we will
19 be done.

20 THE COURT: Okay. So maybe Wednesday?

21 ATTORNEY NUNAN: Sounds good to me.

22 ATTORNEY JONES: That's my best guess.

23 THE COURT: All right. Anything else to take up?
24 Mr. Schroeder, did you want to take up any scheduling issues
25 today?

1 ATTORNEY SCHROEDER: I mean, I always like to take up
2 scheduling issues, Your Honor. Just, the only thing is that
3 Dr. Conroy, we've just got to make sure, if you're going to put
4 Dr. Russell on, I want to give her some clarity on when she
5 needs to be here because I want her to be able to work outside
6 of the courthouse and then get here when you need her to
7 testify.

8 ATTORNEY NUNAN: I think that it's safe to say not
9 until 1:00 o'clock.

10 ATTORNEY SCHROEDER: Okay. That's fair.

11 THE COURT: This is for Dr. Conroy?

12 ATTORNEY SCHROEDER: Yes.

13 THE COURT: Okay. Thank you, everyone.

14 (Whereupon at 4:32 p.m. the hearing was adjourned.)

15 C E R T I F I C A T E

16 I, Sunnie Donath, RMR, Official Court Reporter
17 for the United States District Court, District of Vermont, do
18 hereby certify that the foregoing pages are a true and accurate
19 transcription of my stenographic notes of the hearing taken
20 before me in the above-titled matter on March 31, 2025 to the
21 best of my skill and ability.

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Sunnies Donath, RMR

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